

FILE COPY

IN THE

**Supreme Court of the United States**

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD  
OF HEALTH OF THE CITY OF CHICAGO, DR.  
ROBERT A. BLACK, Health Commissioner and Acting  
President of Board of Health of the City of Chicago,

*Petitioners,*

vs.

FIELDCREST DAIRIES, INC.,

*Respondent.*

JOINT STATEMENT OF COUNSEL CONCERNING CASE OF  
DEAN MILK COMPANY, AN ILLINOIS CORPORATION  
vs. CITY OF CHICAGO, A MUNICIPAL CORPORATION,  
et al., IN CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
AND APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

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DISTRICT.

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MAY IT PLEASE THE COURT:

During the oral argument of this case Mr. Chief Justice Stone requested counsel for the petitioners and the respondent to submit to the court a statement about the proceedings in the Illinois courts in the case of *Dean Milk Company, an Illinois corporation v. City of Chicago, a municipal corporation, et al.* In compliance with this request, the parties herewith submit their statement, together with excerpts from the record of the Circuit Court of Cook

County, Illinois, case No. 40-C-4521, and from the record of the Appellate Court of Illinois, First District, case No. 41348, in the cause entitled, *Dean Milk Company, an Illinois corporation, plaintiff (appellee in the Appellate Court) v. City of Chicago, a municipal corporation, et al., defendants (appellants in the Appellate Court)*. Some of the papers filed and orders entered in the Circuit Court of Cook County (the trial court) are reproduced in full (except for the emission of captions) and without comment; in other instances the Circuit Court and Appellate Court proceedings are summarized by counsel.

#### A. CIRCUIT COURT PROCEEDINGS—MAY 15 TO MAY 21, 1940.

##### Text of Complaint Filed May 15, 1940.

Now comes the plaintiff, Dean Milk Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, by Dennis J. O'Toole, its attorney, and complaining of the defendants City of Chicago, a Municipal corporation; Edward J. Kelly, as Mayor of the City of Chicago; James P. Allman, as Commissioner of Police; Board of Health of the City of Chicago; Herman N. Bundesen, as President of the Board of Health of the City of Chicago; and Francis A. Dulak, Harry J. Reynolds and Louis E. Schmidt and Lloyd Arnold, as members of the Board of Health of the City of Chicago, alleges as follows:

1. That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois; that the objects and purposes for which said corporation was incorporated are: to buy, sell, deal in, manufacture, process, eat, store and ship cream, milk, butter,

cheese, ice cream, ice-cream mix, sugar, condensed milk, powdered milk, evaporated milk, malted milk, distilled water, milk products and by-products, ice and all such other articles as may be necessary or may be conveniently used in connection with the aforesaid business or businesses; to own, lease and manage, directly or through subsidiaries, dairies and dairy farms, creameries and cheese factories, and conduct a general manufacturing business. That the corporate structure of plaintiff consists of 100,000 shares of common stock of no par value, of which 72,500 shares have been issued and 15,000 shares of preferred stock, the par value of which is \$60 per share and of which 7,500 shares have been issued. That the reasonable value of all the machinery and equipment owned and belonging to plaintiff and which is used in the carrying on and functioning of its business is approximately \$1,700,000; that the cost of three machines hereinafter more fully described which are used by plaintiff in the filling and packaging of the Grade "A" milk sold by plaintiff is in the amount of \$15,000 each, and a royalty is paid to the licensor of the machines depending on the number of packages or containers used.

2. That the defendant, City of Chicago, is a Municipal corporation located in the County of Cook in the State of Illinois. The defendant, Edward J. Kelly, is the duly elected, qualified and acting mayor of the City of Chicago and is charged with the enforcement of the ordinances of said city and with the administration of the governmental affairs of said city. The defendant, James P. Allman, is the duly appointed, qualified and acting superintendent of police of the City of Chicago and as such is the head of the police department of said city, and is also charged with the enforcement of the ordinances and regulations of said city. That the defendant, Board of Health of the City of

Chicago is a board established for the city, having as its purpose the management and control of all matters and things pertaining to the health work of the city. That the defendants, Herman N. Bundesen, as President of the Board of Health of the City of Chicago, and Francis A. Dulak, Harry J. Reynolds, and Louis E. Schmidt and Lloyd Arnold, as members of the Board of Health of the City of Chicago were duly appointed to perform and enforce all the laws of the City and the provisions of the Municipal Code of the City of Chicago pertaining to the public health and sanitary condition of the City. The said Board of Health and its members have the duty of investigating or causing to be investigated the place of business of any and all applicants for a license to sell milk or milk products in the City of Chicago as well as to investigate the vehicles, methods and equipment used by such applicants.

3. (a). That the milk and milk products sold and distributed by plaintiff are secured, pasteurized and packaged in its plant and factory located in the town of Chemung in the State of Illinois, approximately seventy-six miles from Chicago. The milk used by plaintiff is received each morning from farms which have been inspected and approved by the Board of Health of the City of Chicago, pursuant to Chapter 154 of the Municipal Code of Chicago, section 17. When the milk is received it is tested by a test commonly known as the "methylene blue" test. The milk is then weighed and placed in a tank from which tank it is run through certain equipment known as "Flash" pasteurizing equipment, which "Flash" pasteurizing process consists of heating the milk to a temperature of  $161\frac{1}{2}$  degrees Fahrenheit and holding the milk at said temperature for at least sixteen seconds, which method is in accordance with the Statutes of the State of Illinois, to-wit,

section 1 of an act entitled "An Act regulating the handling, processing, labeling, sale, and distribution of pasteurized milk and milk products," approved July 24, 1939.

(b). After the milk is so processed it is immediately cooled and placed in a sanitary tank connected with a machine known as the "Ex-Cell-O" machine, where it is packaged or placed in containers known as single-service containers of less than one gallon in size, to-wit: quarts, pints, and half-pints.

4. That the factory or plant of plaintiff and its equipment and the pasteurization process used by plaintiff have been approved by the State of Illinois and a permit issued to plaintiff on November 17, 1938, again on January 18, 1939, and again on April 25, 1940.

5. That prior to the issuance of each of the permits to plaintiff by the State of Illinois, its plant, equipment and method of operation were inspected by the State Department of Health of the State of Illinois and found to comply with the provisions of an act entitled "An Act regulating the handling, processing, labeling, sale, and distribution of pasteurized milk and milk products"; that attached hereto as Exhibit "B" and made a part hereof is a copy of said Act which was approved on July 24, 1939.

6. (a). That plaintiff in packing or packaging its milk or milk products causes the same to be placed by the aforesaid "Ex-Cell-O" machine in containers known as single-service containers and described as "Pure-Pak"; that said "Pure-Pak" containers are made of virgin spruce pulp, manufactured by the Cherry River Paper Company of Richwood, West Virginia. In the manufacture of these containers no other material of any kind other than virgin spruce pulp is used.

(b). The pulp used in making the containers is made from logs which are cleaned of bark and washed and chipped. The chips are then cooked for twenty hours in a sulphur-lime solution at a temperature of 250 degrees Fahrenheit, thereby killing any bacteria which might exist in the pulp. The water used in the manufacturing process is first sand-filtered and sterilized with chlorine and ammonia. In making the fibre board for the container, the pulp is passed over thirty-five hot cylinders which are heated by steam at fifteen pounds pressure. The fibre board is then free of bacteria.

(c). The fibre board is then packed and sent to Gardner-Richardson at Middletown, Ohio, where it is cut into a blank form. All the information required by section 11 of chapter 154 of the Municipal Code of the City of Chicago is then printed upon the blank form, together with the name and address of the Dean Milk Company and the quantity and quality of the product to be therein contained. The forms are packed in a sanitary sealed package and then shipped to the plant of the plaintiff. Attached hereto as Exhibit "C" and made a part hereof is one of the forms of containers above mentioned.

7. (a). The "Ex-Cell-O" machine, into which the milk is diverted for the purpose of packaging as hereinabove set forth, is a machine for the automatic forming, paraffining, filling and sealing of the blanks or containers, which when formed, make the "Pure-Pak" container. A quantity of these fibre board blanks are placed on a tray of the "Ex-Cell-O" machine and then are automatically conveyed into the machine. In the machine the containers are opened, formed and glued before they are paraffin-coated and sterilized. The paraffin used as a sealing agent on the fibre board blanks is manufactured by the Socony-Vacuum

Corporation of New York, New York, and complies with the U. S. Pharmacopeia X standard. The paraffin is pre-heated and passed through a filter screen and the containers are immersed therein and thereafter sterilized for thirty seconds at 172 degrees Fahrenheit. Thereafter the containers are cooled at 39 degrees Fahrenheit before they are filled with milk. All of which process takes place automatically and without being touched by human hands.

(b). That said container after being so immersed in paraffin has adhered to the interior and exterior surfaces thereof a sufficient quantity of paraffin so as to make it impervious to the absorption of its milk content as well as to prevent infiltration of moisture from the outside. The adhesive used at the bottom of the paper container before the same is immersed in the paraffin bath is not in any respect harmful and is prepared, packaged and shipped in a sanitary manner.

(c). Within sixty seconds after the containers have been sterilized they are filled with milk, which is measured automatically by the "Ex-Cell-O" machine and the top of the container is stapled with a sterilized tinned wire staple. The top of this container is stapled together with tremendous pressure, one side of the container being folded over the other in a tight seal, which from the heat of the tinned wire melts this paraffin sufficiently to reseal tightly the said fold. After being filled and stapled the containers are placed by the operator of the "Ex-Cell-O" machine in corrugated boxes, which are closed and sealed with a paper adhesive strip. Attached hereto and made a part hereof, as Exhibit "D", is a pamphlet issued by the "Ex-Cell-O" Corporation, describing the "Pure-Pak" containers and method by which they are filled with milk.

(d). After the single-service containers are filled with milk or milk products they are inserted in a cooler having

a temperature of 34 degrees Fahrenheit, which temperature is maintained at all times thereafter until the milk is ready for shipping in plaintiff's refrigerated trucks or other means of refrigerated conveyors.

8. The machinery and equipment used in the packaging and selling of milk and milk products in the "Pure-Pak" single-service containers of the plaintiff are so constructed as to prevent any part of any person or his clothing from coming in contact with any surface with which the milk or milk products come in contact in the process of packaging. All parts of said machinery and equipment can be readily cleaned and are so constructed as to prevent any foreign substance from reaching the inside parts thereof. All surfaces of the machinery and equipment with which the milk comes in contact are smooth, being of stainless steel, the same type as used by Chicago dairies. Said equipment is easily accessible for cleaning. All employees performing such work wear clean outer garments and maintain a high standard of cleanliness at all times while so engaged in said work. All the vehicles and means of conveyance used by plaintiff in transporting said milk or milk products are completely enclosed and so constructed for the purpose of protecting the milk and milk products from heat, freezing or contamination, and bear the name of plaintiff displayed in a prominent place thereon.

9. That said above described single-service containers are sterile and are light and safe in handling. That said containers after being once used cannot be used again. The manufacturing of single-service containers complies in every respect with the rules and regulations of the Board of Health of the City of Chicago and the Ordinances of the City of Chicago with regard to milk and milk products, a copy of which ordinances is hereto attached, marked

Exhibit "E" and made a part hereof. That plaintiff's place of business, its vehicles, equipment, machinery and processes used in packaging and the sale of milk and milk products are in every respect sanitary and fit for the uses and purposes of selling milk and milk products in the City of Chicago, and comply with the ordinances of the City of Chicago and the rules and regulations of the Board of Health.

10. That plaintiff's milk plant at Chemung, Illinois, where the above described pasteurization and packaging of milk in single-service containers takes places, has been inspected and approved by the Board of Health of the City of Chicago for the sale of Grade "A" milk and cream at wholesale and said approval exists at this time and has existed since June 22, 1936.

11. (a). That plaintiff has on May 2, 1940, and prior thereto, made application to the City of Chicago and Board of Health of the City of Chicago for a license or permit to sell its Grade "A" pasteurized milk and milk products packaged in the aforementioned containers, which are commonly known as single-service containers, within the corporate confines of the City of Chicago, but said City of Chicago and the Board of Health of the City of Chicago have refused to issue a permit or license to plaintiff to do same. That said refusal has been based upon Section 15 of Chapter 154 of the Municipal Code of Chicago, which is as follows:

"Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles. Provided, however, that nothing herein contained shall be construed to prohibit hotels, soda fountains, restaurants, and similar establishments from dispensing milk or milk products from sanitary dispensers approved by the board of health."

said defendants claiming that the single-service containers in which the milk or milk products of this plaintiff are packaged are not "standard milk bottles" as provided by said Code of the City of Chicago.

(b): That on, to-wit, the 2nd day of May, 1940, the following communication was addressed to the Chicago Board of Health by plaintiff:

"May 2, 1940.

Chicago Board of Health,  
54 Hubbard Street,  
Chicago, Illinois.

Attention Dr. Herman N. Bundesen, Pres.  
Gentlemen:

As duly elected president of the Dean Milk Company, an Illinois corporation, I hereby make formal request and application for the immediate issue of a permit in the name of the Dean Milk Company to sell and distribute Grade A pasteurized milk and milk products within the City of Chicago, pasteurized and packed in single-service containers at Chemung, Illinois; said Chemung plant, as the Board knows, was thoroughly checked by representatives of the Board, and said plant now holds and has held since 1938 certificates of approval for a pasteurization plant issued by the State Department of Public Health.

I make this immediate request for a permit for the Dean Milk Company because:

1. The United States Public Health Code and ordinance has approved single-service containers.
2. The Chicago Board of Health, by formal resolution in a lawful and proper meeting on October 16, 1939, approved and recommended the use of single-service containers, as follows:

"The Board of Health recommended to the City Council that Section 154-15 of the Municipal Code of Chicago be amended by adding the words "or in single service containers" after the words "standard milk bottles" in the third sentence of such section, and

"That the Board adopt such standards as have been promulgated and recommended by the U. S.

Public Health Service for the manufacture and handling of single service containers and which are herewith attached.'

3. Lastly, because proved and satisfactory experience in 488 cities and villages throughout the United States, from a public health standpoint, have shown single-service containers to be completely satisfactory, safe and advisable.

Respectfully requested,

DEAN MILK COMPANY,

*President.*

SED:DL.

P. S. Right close to home in the suburbs, we find Evanston receiving the highest U. S. Public Health Rating in the annual U. S. Public Health ratings, and the members of the Chicago Board of Health know Evanston has used our single-service containers for many, many months."

12. (a). That the use of single-service containers has become standard in many places in the United States. The manufacturing and processing of the single-service containers has passed all the required tests of the respective health authorities of the following states and are now therein used:

District of Columbia,  
California,  
Delaware,  
Illinois,  
Kentucky,  
Maine,  
Massachusetts,  
Michigan,

New Hampshire,  
New Jersey,  
New York,  
North Carolina,  
Ohio,  
Oregon,  
Pennsylvania, and  
West Virginia.

(b). That the packaging and sale of plaintiff's milk and milk products in said single-service containers has been approved by the health authorities of municipalities about the City of Chicago. The following is a list of such municipalities in which for a considerable length of time plain-

tiff's milk and milk products in single-service containers have been sold without any harmful or detrimental effects to the persons purchasing and using the same:

Arlington Heights,  
Bellwood,  
Bensenville,  
Berkeley,  
Berwyn,  
Broadview,  
Brookfield,  
Blue Island,  
Calumet Park,  
Congress Park,  
Chicago Ridge,  
Deerfield,  
Des Plaines,  
Dixmoor,  
Dolton,  
East Chicago Heights,  
East Hazelcrest,  
Elmhurst,  
Elmwood Park,  
Evanston,  
Fairview,  
Flossmoor,  
Forest Park,  
Franklin Park,  
Glencoe,  
Glenview,  
Glen Ellyn,  
Greenwood,  
Hazelcrest,  
Hinsdale,  
Homewood,  
Highland Park,  
Highwood,  
Kenilworth,

LaGrange,  
Lake Forest,  
Lansing,  
Lombard,  
Lyons,  
Maywood,  
Melrose Park,  
Midlothian,  
Morton Grove,  
Mount Prospect,  
Niles Center,  
Northbrook,  
North Riverside,  
Oak Lawn,  
Oak Park,  
Orland Park,  
Palos Park,  
Park Ridge,  
Phoenix,  
Posen,  
Riverdale,  
River Forest,  
River Grove,  
Riverside,  
Robbins,  
Schiller Park,  
Stickney,  
South Holland,  
Villa Park,  
Western Springs,  
Wheaton,  
Wilmette,  
Winnetka, and  
Worth.

(c). That the following is a partial list of the 490 cities in the United States in which milk and milk products are sold in single-service containers:

New York, New York,  
 Washington, D. C.,  
 Cleveland, Ohio,  
 Detroit, Michigan,  
 Toledo, Ohio,  
 Philadelphia, Pennsylvania,  
 Los Angeles, California,

Baltimore, Maryland,  
 Trenton, New Jersey,  
 San Francisco, California,  
 Jersey City, New Jersey,  
 Boston, Massachusetts,  
 Wilmington, Delaware,  
 Superior, Wisconsin.

13. That plaintiff in making its application for license or permit to sell its milk or milk products in single-service containers in the City of Chicago has sent its check for \$60.00 to the Board of Health to cover the costs of issuing a license or permit to plaintiff to sell its above-described products in the City of Chicago.

14. (a) The U. S. Public Health Service (Public Health Bulletin No. 220, 1939 Edition), in the recommendation of a milk ordinance and code to be adopted by the states and municipalities of the United States has recommended the use of single-service containers such as are used by the plaintiff herein. Item 12r of Section 7 of said recommendations states as follows:

"All multi-use containers or other utensils used in the handling, storage, or transportation of milk or milk products must be made of smooth nonabsorbent material and of such construction as to be easily cleaned, and must be in good repair. Joints and seams shall be soldered flush. Woven wire cloth shall not be used for straining milk. All milk pails shall be of small-mouth design approved by the health officer. The manufacture, packing, transportation, and handling of single-service containers and container caps and covers shall be conducted in a sanitary manner."

and item 10p of said Section 7 states as follows:

"All multi-use containers and equipment with which milk or milk products come in contact shall be constructed in such manner as to be easily cleaned and shall be kept in good repair. The manufacture, packing, transportation, and handling of single-service containers and container caps and covers shall be conducted in a sanitary manner.

(5) The manufacture, packing, transportation, and handling of single-service containers and container caps and covers are conducted in accordance with the following requirements. Inspections required herein may be made by the health officer or by any agency authorized by him.

(a) The buildings and rooms in which single-service containers and container caps and covers are manufactured, packed, stored, and handled shall be clean, well lighted, and ventilated, and free of dust and flies, as prescribed in items 1p, 2p, 3p, 4p, 6p, 7p, 8p, and 11p.

(b) The average bacterial plate count of the stock from which single-service containers and container caps and covers are made shall not exceed 250 colonies per gram. No substance shall be present in finished single-service containers and container caps and covers which is toxic.

(c) All operations at the fabrication plant and during transportation of the manufactured articles shall be conducted as to reduce to a minimum the possibility of contaminating the manufactured articles, as prescribed in items 13p, 14p, and 15p.

(d) All of those parts of machinery and equipment with which the article being manufactured comes in contact shall be kept clean.

(e) All single-service containers and container caps and covers shall be so treated as to be as impervious to milk and milk products as practicable.

The porous condition of paraffined containers now available and the sloughing off of particles of paraffin into the product are undesirable, and manufacturers of single-service containers are urged to make every effort to provide a nonabsorbent non-flaking surface.

(f) All single-service containers and container caps and covers shall prior to use be given bactericidal treatment equivalent to contact with paraffin for at least 20 seconds at at least 180° F., or for at least 35 seconds at at least 175° F., or for at least 1 second at at least 225° F., in approved equipment operated in an approved manner. The bactericidal treatment equipment shall be provided with approved indicating and recording thermometers, and shall be so designed as automatically to insure the required temperature and contact time."

(b) That the rooms and buildings in which the single-service containers used by plaintiff are stored, packed and handled, are clean, well lighted and ventilated, and are free of dust and flies. That the average bacterial plate count of the stock from which the single-service containers used by plaintiff are made is considerably less than 250 colonies per gram, and no toxic substance is present in the finished single service container used by plaintiff. There is no possibility of contamination of the milk or milk products of plaintiff in their production, packaging or transportation. The surface of the single service containers used by plaintiff, after being paraffined is nonabsorbent and nonflaking. No particles of paraffin on the container slough off. The containers used by plaintiff are, prior to their use, given bactericidal treatment equivalent to contact with paraffin for 35 seconds at 175 degrees Fahrenheit, the equipment therefor being provided with thermometers which automatically insure such temperature and contact time.

15. (a) At a meeting of the Board of Health on November 12, 1935, the following resolution was adopted as part of the rules and regulations of the Board of Health:

"Whereas, the present increase in the number of cases of Scarlet Fever in the City of Chicago is increasing the possibility of milk borne infections, and

Whereas, it now becomes urgent and necessary for

milk and milk products used in the City of Chicago to be dispensed only in unopened original containers, as received from the distributor;

Therefore, Be It Resolved:

That all milk and milk products shall be sold, served or dispensed to the final consumer only in unopened original containers as received from the distributor; and no fractional portion or part of any original package or container shall be served or dispensed for consumption except for manufacturing purposes."

(b) At a meeting of the City Council of the City of Chicago the following resolution was introduced by Herman N. Bundesen, in which the City Council of the City of Chicago was asked to modify the milk ordinance so that single-service containers may be used in Chicago:

"Since my only concern as President of the Chicago Board of Health with regard to paper containers has been to have as positive assurance as possible that fresh fluid milk can safely be delivered in such containers, and

Because the U. S. Public Health Service, whose standard milk ordinance has been adopted by the City of Chicago has not heretofore included definite standards for the manufacture of single service containers, and

Because it was believed that we would not be acting in the best interests of safety in permitting the use of these containers until the U. S. Public Health Service had adopted suitable regulations for their manufacture and use, and

Because we have in the past followed closely the requirements of the Service, it was deemed advisable to prohibit the use of these containers in the absence of such regulations, and

Since it has now been brought to our attention that such standards have now been adopted by the Service, it is moved that

The Board of Health recommend to the City Council that Section 154-15 of the Municipal Code of Chicago be amended by adding the words "or in single service

containers" after the words "standard milk bottles" in the third sentence of such section, and

That the Board adopt such standards as have been promulgated and recommended by the U. S. Public Health Service for the manufacture and handling of single service containers and which are herewith attached."

(Said recommendation being hereto attached as "Exhibit E" and made a part hereof.)

(e) That the single service containers used by the plaintiff have been accepted and approved as sanitary, and fulfill the requirements of the rules and regulations of the Board of Health of the City of Chicago.

16. That the plant of plaintiff has been inspected by the officials of the State of Illinois and the method of pasteurizing, packaging and selling the Grade A milk and milk products of plaintiff in single-service containers has been approved by the State of Illinois; that the plant of plaintiff has been inspected and approved by the Board of Health of the City of Chicago for the sale of Grade "A" milk and cream at wholesale; that the packaging and sale of milk in single-service containers has been recommended by the Chicago Board of Health and the defendant Herman N. Bundesen, as president of the Board of Health of the City of Chicago.

Yet despite all of the foregoing, the City of Chicago has failed and persists in not issuing a license or permit to plaintiff to sell within the City of Chicago its Grade "A" pasturized milk and milk products, which are packed in single service containers.

17. The plaintiff is now ready, willing and able to sell its Grade "A" milk and milk products in said container to retail stores for consumers and to the consumers themselves in the City of Chicago; that certain milk distribu-

tors are desirous of entering into contracts with plaintiff to buy said products contained in single service containers from plaintiff; that the refusal by the defendants of permission to plaintiff to sell such products in single-service containers is arbitrary, unreasonable, unlawful and capricious and as a result thereof plaintiff has suffered and will continue to suffer a loss of many thousands of dollars.

18. (a) That the City of Chicago in failing to permit plaintiff to sell its Grade "A" pasteurized milk and milk products contained in single service containers in the City of Chicago is giving preferential treatment to those milk companies and milk producers who are selling their milk and milk products within the City of Chicago in glass containers and said preference tends to create a monopoly in the sale of milk in the City of Chicago, which thereby makes said section of the ordinance unlawful and void.

(b) That the milk and milk products contained in glass containers and which are sold in the City of Chicago are capped or have on the top thereof a piece of cardboard which is porous and in many instances not coated with paraffin, and which for all practical purposes creates a situation of danger and grave concern; that although such situation exists the sale of milk or milk products in glass containers which are thus capped is not prohibited or prevented by the City of Chicago or the Board of Health.

(c) That numerous food products for human consumption are sold in paper or cardboard containers, to-wit, ice cream, cheese, butter, oysters, pickles and many other products; that the sale of said food products in such containers is not prohibited by the City of Chicago and the Board of Health.

19. That glass milk containers before they are filled with milk must be sterilized and subjected to a chlorine rinse;

that the process of so sterilizing gives rise to many evils which are conducive to the contamination of milk being thus enclosed in glass containers. That said glass containers are used over and over again while the single-service containers sold by plaintiff are used only once by the consumer and then destroyed and disposed of.

20. That the defendants have threatened to prosecute and arrest the plaintiff if plaintiff sells or attempts to sell its Grade "A" pasteurized milk and milk products so contained in the single-service containers within the City of Chicago; that plaintiff is informed and believes that the defendants will carry out their threat and such threat has caused the plaintiff to refrain from selling its Grade "A" pasteurized milk and milk products in single-service containers, within the City of Chicago thereby resulting in the loss of many thousands of dollars to plaintiff by such inability to sell its products. That plaintiff is informed and believes it will be prosecuted in numerous courts and will be otherwise harassed, annoyed and injured by defendants if plaintiff attempts to sell its Grade "A" pasteurized milk and milk products in single-service containers within the City of Chicago, although the defendants have failed and still fail to issue a permit to plaintiff to sell such products and such refusal is unreasonable, arbitrary and without justification therefore.

21. (a) That the contents of the said single-service containers are incapable of contamination from rehandling after the filing thereof without the seal on the container being tampered with or the contents removed. In the event a single-service container is exposed to freezing weather, the contents of said container are not forced out by expansion as in the case of frozen milk in a glass container, for at the top of said single service container there is room

for expansion which has been scientifically prepared. The single service containers are less likely to break than the glass containers in use in the City of Chicago, and which bears the approval of the defendants.

22. That the use of said single service containers is more economical and the distribution and sale of Grade "A" pasteurized milk and milk products to consumers in the City of Chicago can be made at a lower cost and price to said consumers than the milk and milk products furnished and contained in glass containers; that said single service containers used by plaintiff at all times contain the true and correct measure and quality of Grade "A" pasteurized milk and milk products.

23. That the conduct of the defendants in refusing to issue a permit or license to plaintiff to sell its Grade "A" pasteurized milk and milk products in single-service containers within the City of Chicago is unreasonable, illegal, and prejudicial and such conduct is without justification therefor; that such conduct deprives plaintiff of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States, and section 2 of Article 2 of the Constitution of the State of Illinois, and section 13 of Article 2 of the Constitution of the State of Illinois, in that said acts on the part of the defendants deprive plaintiff of its property without due process of law.

24. That the provisions of the Municipal Code of the City of Chicago as hereinbefore set forth and referred to, do not prohibit the use of the single-service container so used by plaintiff and known as "Pure-Pak" containers and no rule or regulation of the Board of Health of the City of Chicago prohibits the use of said single-service container within the City of Chicago; that the denial to

the plaintiff by the defendant of a permit or license to sell its Grade "A" pasturized milk and milk products in single-service containers within the City of Chicago is unreasonable, arbitrary, discriminatory and unlawful.

25. That said section 15 of Chapter 154 of the Municipal Code of Chicago which provides that all Grade "A" pasteurized milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles is unconstitutional and invalid in that it fails to explain or to define in any form or manner what constitutes a "standard milk bottle," its shape, size, or the material of which same must be made, and said provision is unconstitutional and invalid as it deprives plaintiff of due process of law and equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States, and section 2 of Article 2 of the Constitution of the State of Illinois, and Section 13 of Article 2 of the Constitution of the State of Illinois; and the prohibition by the defendants against plaintiff's use of the single-service container by virtue of said section of the Municipal Code of Chicago amounts to taking and damaging of property of plaintiff without just compensation in violation of section 13 of Article 2 of the Constitution of the State of Illinois.

Wherefore, plaintiff prays that summons issue out of and under the seal of this court against the above named defendants, and plaintiff prays for the following relief:

(1) That a temporary writ of injunction issue against defendants and each of them, restraining and enjoining said defendants and each of them from:

(a) In any manner or by any means from interfering with, obstructing, or hindering the plaintiff from the sale and distribution of its Grade "A" Pasteurized milk or milk

products in single service containers or containers known as "Pure-Pak" containers within the City of Chicago.

(b) From prosecuting the plaintiff in any action at law or in equity or in any criminal action purporting or alleged to arise out of the so-called violation by plaintiff of the ordinance or the municipal Code of the City of Chicago regarding the sale of Grade "A" pasteurized milk in single-service containers or "Pure-Pak" containers in the City of Chicago.

(c) From arresting, molesting, annoying, injuring, harming, or abusing plaintiff or its officers, agents, and servants in the sale and distribution of plaintiff's Grade "A" pasteurized milk and milk products in single-service containers or "Pure-Pak" containers within the City of Chicago.

(d) From confiscating, damaging, injuring or destroying any or all of plaintiff's Grade "A" pasteurized milk or milk products contained in single-service containers or "Pure-Pak" containers which at any time or times may be within the corporate confines of the City of Chicago.

(e) From continuing to refuse and failing to issue to the plaintiff a permit or license to sell, offer for sale, expose for sale, dispose of, exchange, or deliver, the Grade "A" pasteurized milk or milk products of plaintiff packaged and contained in containers known as single-service containers or "Pure-Pak" containers.

(2) That upon a final hearing, the defendants and each of them may be permanently restrained and enjoined from committing, performing or doing or from failing to do or performing any of the above mentioned acts, doings, or performances herein complained of.

(3) And for such other further relief as equity may require.

Dean Milk Company,  
*An Illinois Corporation.*

By (Signed) Sam E. Dean,  
*Its Duly Authorized Agent.*

STATE OF ILLINOIS, }  
COUNTY OF COOK. }ss.

Sam E. Dean, being first duly sworn, on oath deposes and states that he is the President of Dean Milk Company, an Illinois corporation, and is its duly authorized agent on this behalf; that he has read the above and foregoing complaint by him subscribed; that he knows the contents thereof and that the matters and the things therein alleged are true in substance and in fact, except as to those matters and things he verily believes to be true.

Affiant further states that he believes irreparable damage and harm will ensue to plaintiff unless a temporary injunction is issued as prayed for in said complaint and unless the defendants are enjoined and restrained from doing or performing the actions complained of in said complaint.

(Signed) Sam E. Dean.

Subscribed and sworn to before me this 15th day of May,  
A. D. 1940.

(Signed) Gladys L. Burton,  
*Notary Public.*

Plaintiff's Exhibit "B" attached to complaint is a printed copy of Milk Pasteurization Plant Law of the State of Illinois and Minimum Requirements For Construction, Equipment, maintenance and Operation of Milk Pasteur-

ization Plants. Revised August, 1939. 65 pp. issued by Illinois Department of Public Health.

Plaintiff's Exhibit "C" attached to complaint is a sample of plaintiff's milk container blank similar to those in evidence in *City of Chicago v. Fieldcrest Dairies, Inc.* Oct. term, 1941, No. 706.

Plaintiff's Exhibit "D" attached to complaint is an advertising folder describing the "Pure-Pak" containers.

Plaintiff's Exhibit "E" attached to complaint is a copy of Chapter 154 of the Municipal Code of Chicago, containing *inter alia* the following sections:

154-2. No person shall sell, offer for sale, expose for sale, dispose of, exchange, or deliver, or with the intent so to do have in his possession, care, custody, or control, milk or milk products for human food, without having obtained a license for that purpose from the city.

154-8. It shall be unlawful for any person to bring into or receive into the city, for sale, or to sell or to offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk products unless such person possesses a permit from the board of health; and on his vehicle there appears in a conspicuous place the name and address of the milk distributor and the permit number and such other identification in such manner as is required by the board of health.

Such permit may be revoked by the board of health upon violation by the permittee of any of the provisions of this chapter or of any of the rules and regulations of the board of health, or in any emergency when, in the judgment of the board of health, the milk or milk product handled by the permittee has or may become a public health menace, or in any case in which the permittee refuses the board of health the right of entrance to any dairy farm, milk plant, or vehicle, or any other place where milk or milk products are kept or stored, for the purposes of inspection or the collection and examination of sam-

ples; provided that the permittee shall, after abiding by such revocation, upon request have the right of a hearing before the board of health.

154-15. All pasteurized milk and milk products shall be placed in their final delivery containers in the plant in which they are pasteurized, and all certified milk or milk products sold for consumption in the raw state shall be placed in their final delivery containers at the farm at which they are produced.

Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles. Provided, however, that nothing herein contained shall be construed to prohibit hotel, soda fountains, restaurants, and similar establishments from dispensing milk or milk products from sanitary dispensers approved by the board of health.

The delivery of milk and milk products to, and the collection of milk and milk products containers from, quarantined residences shall be subject to the rules and regulations of the board of health.

[Note: Sec. 154-15 is a portion of Sec. 3094 in *City of Chicago v. Fieldcrest Dairies, Inc.*, Oct. Term, 1941, No. 706, Rec. 108-109.]

Plaintiff's Exhibit "F" attached to the complaint is Section 10 as it will appear in the 1939 printed U. S. Public Health Service Milk Code, October 7, 1939, printed in *Fieldcrest* record, Vol. III, pp. 1699-1704.

#### **Text of Answer Filed May 21, 1940.**

The defendants; City of Chicago, a municipal corporation; Edward J. Kelly, Mayor of the City of Chicago; James P. Allman, Commissioner of Police of the City of Chicago; Herman N. Bundesen, President of the Board of Health of the City of Chicago; and Francis A. Dulak, Harry J. Reynolds, Louis E. Schmidt and Lloyd Arnold, members of the Board of Health of the City of Chicago, by Barnet Hodes, Corporation Counsel, and Walter V.

Schaefer, Assistant Corporation Counsel, their attorneys, answering the complaint in this case say:

1. The City of Chicago has a population of more than three and one-half million inhabitants. In the City of Chicago large quantities of milk, cream, butter milk, chocolate drink and other milk products are consumed daily. During the year 1937 an approximate daily average of 277,000 gallons of milk were sold for consumption in the City of Chicago. During the same period an approximate daily average of 27,500 gallons of cream and 20,750 gallons of milk products, such as buttermilk and chocolate milk, were sold for consumption in the city.

2. Milk, when properly produced, processed and handled, is the most nearly perfect human food. There is no article of human food more generally used than milk. Pure milk is an indispensable item in the diet of infants and children, and it is likewise an important constituent part of the diet of most invalids, and the aged and infirm. Far more milk is consumed by infants and children than is consumed by all of the other age groups in the population combined.

3. Although milk is an excellent human food, it is also an excellent medium for the growth and transmission of bacteria. The precise factors which make milk an ideal food for human beings of all ages also make milk a perfect food for bacteria.

4. Statistics collected by the United States Public Health Service show that during the decade ending with the year 1934, there was in the United States an annual average of 43 reported epidemics causing wide-spread illness and numerous deaths which have been traced directly to improper milk supplies. Most of these outbreaks have been typhoid fever epidemics, but unwholesome milk has also caused epidemics of septic sore throat, diphtheria, scarlet

fever, dysentery and poliomyelitis. Impure milk supplies have also resulted in the spread of bone and glandular tuberculosis and infantile diarrhea, as well as in the spreading of diseases of an epidemic nature.

5. Because of the grave menace to the health of the public generally which is inherent in an impure milk supply, and also because of the extreme susceptibility of infants and children, who are the principal consumers of milk, to the presence of disease organisms, impurities, adulterants and foreign substances of all types in milk, the maintenance of a pure and wholesome milk supply is one of the principal concerns of municipal government, and has long been so recognized.

6. The health of the public cannot adequately be protected against the hazards of an impure milk supply unless every step in the production, processing and distribution of milk is carefully safeguarded in such a manner that disease organisms present in milk are eliminated, and the possibility of the introduction of disease organisms, impurities, adulterants, or any foreign substances into milk is prevented during its production, processing and distribution.

7. Tuberculin tests for cattle are required in the State of Illinois and almost uniformly throughout the country. The plant and equipment of the farmer who produces milk for consumption in fluid form, as well as the plant and equipment of each person subsequently handling such milk during the course of its processing and distribution, are regulated with a view to preventing the possibility of the contamination or adulteration of milk.

8. The General Assembly of the State of Illinois has conferred authority upon the City of Chicago:

"To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions,

and to provide for place and manner of selling the same and to control the location thereof."

"To provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour, meal and other provisions."

"To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease." (Ill. Rev. Stat. 1937, Ch. 24, Par. 65.49, 65.52 and 65.77.)

9. In the exercise of the powers conferred upon it by the General Assembly for the protection of health of the inhabitants of the city, the City of Chicago has adopted an ordinance regulating the production, processing and distribution of milk. Said ordinance provides for the regulation of every phase of the production, processing and distribution of milk from the cow to the consumer because improper handling of milk in the distribution thereof can and will completely nullify the effect of sanitary production and processing. Included in said ordinance of the City of Chicago is the provision attacked by the plaintiff in this case which is as follows:

"Any milk or milk products sold in quantities of less than one gallon shall be delivered in standard milk bottles . . ." (Municipal Code of Chicago, section 154-15.)

10. Said ordinance of the City of Chicago first enacted in January of 1935. Prior to January of 1935 and up to the present date, the bottles in which milk in quantities of less than one gallon has been delivered in the City of Chicago have been and are made of glass. And no distribution of milk in quantities of less than one gallon in any container other than glass milk bottles was permitted. The milk bottles in which milk has been delivered in the City of Chicago have definite characteristics of material and shape. They are made of glass; they are narrower at the

top than at the bottom; and they bulge with a gradual curve to their full width at about middle of the bottle. Glass milk bottles have constituted and now constitute a distinct and definite class of bottles. Paper containers have never been used for the distribution of milk in the City of Chicago. There have been no changes in the shape of milk bottles or in the material of which they are made since the first glass milk bottle was manufactured in 1884.

11. The use of paper containers for the distribution of milk is a comparatively recent development. Only within the past five years has the paper manufacturing industry become aware of the existence of public health problems in connection with the use of paper containers for articles of food and drink. The attention of the paper industry has been devoted primarily to securing favorable consumer reaction to its products, and has been devoted in only a secondary sense, and in very recent years, to the public health problems inherent to the use of paper containers.

12. Fieldcrest Dairies, Inc., a Michigan corporation, authorized to do business in the State of Illinois, is a wholly owned subsidiary of the plaintiff. On February 2, 1939, Fieldcrest Dairies, Inc., instituted a suit in the District Court of the United States for the Northern District of Illinois, Eastern Division, against the City of Chicago and its Board of Health, which suit is pending in said Court as *Fieldcrest Dairies, Inc., a corporation, plaintiff v. City of Chicago, a municipal corporation, et al., defendants, No. 316.* That case involves the identical paper milk container and the construction and validity of the identical provision of the ordinance of the City of Chicago which are involved in the case at bar. In that case a full trial upon the merits has been had before a Master in Chancery

duly appointed by the United States District Court. Upon that trial the testimony of very many expert witnesses was introduced with respect to the meaning and validity of the provision of the ordinance involved in this case and with respect to the sanitary and unsanitary characteristics of the Pure-Pak paper milk containers also involved in this case. 2214 pages of testimony were taken in said case and more than 90 exhibits were offered and received in behalf of the plaintiff and more than 30 exhibits were offered and received in behalf of the defendants. After proofs were closed in said case a printed brief of 191 pages was filed in behalf of the plaintiff. Thereafter an answering printed brief of 58 pages was filed in behalf of the defendants. Subsequently a printed reply brief of 58 pages was filed in behalf of the plaintiff. Thereafter, on April 27, 1940, the report of Honorable Jacob I. Grossman, Master in Chancery of the United States District Court for the Northern District of Illinois, was duly filed in said court. The report of said Master in Chancery decided the issues in favor of the defendants and found that there was evidence in the record "from the plaintiff's own witnesses" from which the City Council of the City of Chicago could reasonably have concluded that prohibition of paper containers was necessary and appropriate to protect the purity and wholesomeness of milk. The Master further found:

"There are steps in the manufacture, conversion and filling of paper containers in which bacteria may get into the walls of the containers.

Paper containers, even when paraffined, are to some extent absorbent and the milk may absorb such bacteria.

Sanitary conditions differ from one paper mill to another and even in the same mill from time to time.

The sanitary conditions of the mill is a significant factor as to the condition of the finished container.

• The sanitary condition of the paper board blank

determines the sanitary condition of the finished container.

Particles of paraffin get into the milk and constitute a foreign substance which preferably should not be in milk, especially for babies.

Odors from paraffin, whether the paraffin is fresh or not, may get into the milk.

If the paper board contains a high amount of bacteria, they may exude objectionable odors which may get into the milk.

The control and precautions by paper manufacturers themselves may not be adequate.

In the case of glass milk bottles, the City has the cleaning process at hand locally and can exercise complete control; in the case of paper containers, inspection at remote places may be necessary but impractical or too expensive.

Some paper containers have been shown to contain high bacterial counts.

Paper containers are not transparent as glass bottles, so that it is difficult to observe the quality of the milk or whether the milk contains dirt or other foreign body.

Cream does not rise to the top in paper containers, so that purchasers may not readily know whether they are getting milk of the required fat content.

The United States Public Health Service Sanitation Board in June 1939 criticized paper containers on account of their absorbency and the sloughing off of paraffin."

Thereafter on May 7, 1940, the objections of the plaintiff to the report of the Master in Chancery were duly filed with the Clerk of said court. Thereafter on May 14, 1940, a motion was duly made in behalf of the defendants for the entry of a decree in accordance with said report. Upon the ground that there was no urgency in the disposition of the matter before the District Court, the plaintiff refused to agree to the defendant's request for a prompt hearing upon the objections to the report of the Master and the motion of the defendant for the entry of a decree.

13. Defendants allege that the Pure-Pak paper container advocated by the plaintiff in this case is neither non-absorbent nor sterile. On the contrary, defendants alleged that said container is absorbent and is not sterile; that there are steps in the manufacture, conversion and filling of paper containers in which bacteria may get into the walls of the containers; that paper containers are absorbent, so that milk placed in such containers may absorb bacteria from the paper walls of the containers; that the sanitary conditions existing in the mill which manufactures the paper, and in all other plants subsequently handling and processing such paper, determine the sanitary condition of the finished milk container; that particles of paraffin from paper containers slough off into the milk placed in those containers; that odors from paraffin get into the milk placed in paper containers; that bacteria present in the paper from which the paper containers are made exude objectionable odors which may get into the milk; that paper containers are not transparent so that it is impossible to observe the quality of the milk and to observe whether or not the milk contains dirt or other foreign object; that milk placed in paper containers undergoes a physical, chemical or electrical process which so affects the physical or chemical characteristics of the milk that the cream therein will not rise to the top of the container as it ordinarily does in containers made of material other than paper; that the paper container sold by the plaintiff contains toxic substances.

14. The defendants have no knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in the following paragraphs of the complaint:

- (a) The allegations of paragraph 1 of the complaint.
- (b) The allegations of paragraph 3(a) of the complaint.

- (c) The allegations of paragraph 3(b) of the complaint.
- (d) The allegations of paragraph 4 of the complaint.
- (e) The allegations of paragraph 5 of the complaint.
- (f) The allegations of paragraph 6(a) of the complaint.
- (g) The allegations of paragraph 6(c) of the complaint.
- (h) The allegations of paragraph 7(c) of the complaint.
- (i) The allegations of paragraph 7(d) of the complaint.
- (j) The allegations of paragraph 8 of the complaint.
- (k) The allegations of paragraph 12(a) of the complaint.
- (l) The allegations of paragraph 12(b) of the complaint.
- (m) The allegations of paragraph 12(c) of the complaint.
- (n) The allegations of paragraph 17 of the complaint.
- (o) The allegations of paragraph 21(a) of the complaint.
- (p) The allegations of paragraph 21(b) of the complaint.
- (q) The allegations of paragraph 22 of the complaint.

15. The defendants admit the allegations of paragraph two of the complaint and allege that the Board of Health is established pursuant to the provisions of the Municipal Code of Chicago and has the powers and is charged with the duties provided in said code.

16. The defendants have no knowledge or information sufficient to form a belief with respect to the truth of the allegations of paragraph 6(b) of the complaint, with the exception of the allegation contained in the last sentence thereof, which allegation is denied.

17. The defendants have no knowledge or information sufficient to form a belief with respect to the truth of the allegations of paragraph 7(a) of the complaint with the exception of the allegations of said paragraph to the effect that immersion of paper containers in paraffin sterilizes such containers, which allegations are denied.

18. Defendants deny the allegations of paragraph 7(b) of the complaint.

19. With respect to the allegations of paragraph nine of the complaint defendants deny that the paper containers therein referred to are sterile, and deny that said containers comply with the ordinances of the City of Chicago. With respect to the truth of the remaining allegations of said paragraph nine of the complaint the defendants have no knowledge or information sufficient to form a belief.

20. The defendants admit the allegations of paragraph ten of the complaint.

21. With respect to the allegations of paragraph eleven of the complaint, defendants say that the ordinance of the City of Chicago requiring that milk sold in quantities of less than one gallon be delivered in standard milk bottles was adopted for the protection of the health of the inhabitants of the City of Chicago. By inspection of the bactericidal methods and other processes employed in connection with the washing of standard milk bottles before they are filled with milk, it is possible to insure against contamination of the milk by its delivery container. Paper milk containers are not and cannot be subjected to effective bactericidal treatment before they are filled with milk and their sanitary condition depends upon conditions existing in distant paper mills and distant processing plants. The sanitary condition of these paper mills and processing plants varies from day to day and from hour to hour. The Board of Health and its members are without power to adopt any rules or regulations or to issue any permits whatsoever in violation of any ordinance of the City of Chicago.

22. The defendants admit the allegations of paragraph thirteen of the complaint, and allege that in making the application referred to in said paragraph Mr. S. E. Dean, the president of the plaintiff, said:

"We would like to make application to meet the Board of Health as soon as possible in order to present to them the facts regarding delivering milk to the City of Chicago in paper containers instead of bottles."

23. Defendants admit that the United States Public Health Service adopted, among other recommendations with respect to paper milk containers, the recommendations set forth in paragraph 14(a) of the complaint. The language of the ordinance of the City of Chicago involved in this case was identical with the language of the standard milk ordinance recommended by the United States Public Health Service. When the United States Public Health Service decided to amend its standard milk ordinance and code to include regulations governing the manufacture and processing of paper milk containers it realized that regulations concerning the manufacture and processing of paper containers could not logically be included in an ordinance which required that milk be delivered in standard milk bottles. It therefore recommended amendment of its ordinance by the insertion of the words "or in single-service containers" immediately after the words "standard milk bottles."

24. Defendants deny the allegations of paragraph 14(b) of the complaint.

25. Defendants admit the allegations of paragraphs 15(a) and 15(b) of the complaint, but deny the allegations of paragraph 15(c) of the complaint.

26. Defendants have no knowledge or information sufficient to form a belief with respect to the truth of the allegations of paragraph 16 of the complaint with respect to inspections of the plant of the plaintiff by the State of Illinois. The defendants admit no license or permit has been issued to the plaintiff to sell milk in Chicago in single-

service containers, and allege that the sale of milk in such containers is prohibited by a valid ordinance of the City of Chicago.

27. With respect to the allegations of paragraph 17 of the complaint as to the relations between the plaintiff and its customers or prospective customers, the defendants have no knowledge or information sufficient to form a belief. The defendants deny the remaining allegations in said paragraph.

28. The defendants deny the allegations of paragraph 18(a) and paragraph 18(b) of the complaint.

29. The defendants admit the allegations of paragraph 18(c) of the complaint but allege that because of the nature of the products there enumerated their sale in paper containers does not involve a health hazard in any way comparable to that involved in the sale of milk in paper containers.

30. With respect to the allegations of paragraph 19 of the complaint, defendants deny that any conditions exist in connection with the process of washing and sterilizing standard milk bottles in the City of Chicago which are inimical to the public health.

31. With respect to the allegations in paragraph 20 of the complaint, defendants admit that the ordinances of the City of Chicago, pertaining to the production, processing and distribution of milk, will be enforced and that the violation of said ordinances will be prosecuted. Defendants deny the remaining allegations of said paragraph.

32. Defendants deny the allegations of paragraph 23 of the complaint.

33. Defendants deny the allegations of paragraph 24 of the complaint.

34. Defendants deny the allegations of paragraph 25 of the complaint.

35. Defendants deny that the plaintiff will suffer any immediate, irreparable injury by reason of the matters and things alleged in the complaint and in the alternative allege that if the plaintiff is entitled to any relief whatsoever because of the matters and things set forth in the complaint its remedy therefore at law is plain, adequate and complete.

**City of Chicago, a Municipal Corporation;**  
**Edward J. Kelly, as Mayor of the City of Chicago;** **James P. Allman, as Commissioner of Police;** **Herman N. Bundesen, as President of the Board of Health of the City of Chicago;** and **Francis A. Dulak, Harry J. Reynolds, Louis E. Schmidt and Lloyd Arnold, as Members of the Board of Health of the City of Chicago,**

*Defendants,*

By **BARNET HODES,**

*Corporation Counsel,*

**WALTER V. SCHAEFER,**

*Assistant Corporation Counsel,*

*Their Attorneys.*

**STATE OF ILLINOIS,** }  
**COUNTY OF COOK.** }

Francis A. Dulak, being first duly sworn, on oath says: I am the duly qualified and acting secretary of the Board of Health of the City of Chicago, and one of the defendants in this case. I make this affidavit on behalf of myself and of the other defendants herein. I have read the foregoing answer and the matters and things therein stated are true.

I have no knowledge or information, and I am advised that the other defendants have no knowledge or information, sufficient to form a belief with respect to the truth of the allegations contained in paragraphs 1, 3(a), 3(b), 4, 5, 6(a), 6(b), 6(c), 7(a), 7(e), 7(d), 8, 9, 12(a), 12(b), 12(e), 17, 21(a), 21(b), and 22 of the complaint.

FRANCIS A. DULAK.

Subscribed and sworn to before me this 20th day of May, 1940.

[Seal] MARGARET M. SMITH,  
Notary Public.

**Text of Report of the Trial Proceedings.  
Filed May 21, 1940.**

**AFFIDAVIT OF WALTER V. SCHAEFER.**

STATE OF ILLINOIS, {  
COUNTY OF COOK, } ss.

Walter V. Schaefer, being first duly sworn, on oath says: I am an Assistant Corporation Counsel of the City of Chicago. As such I am charged with the conduct of the case of *Fieldcrest Dairies Inc. v. City of Chicago et al.*, No. 316 in the United States District Court for the Northern District of Illinois, Eastern Division, and with the conduct of the case at bar. The plaintiff in the case of *Fieldcrest Dairies, Inc. v. City of Chicago et al.*, is a wholly owned subsidiary of the Dean Milk Company; the plaintiff in the case at bar. Said case pending in the United States District Court involves the construction and the validity of the identical ordinance of the City of Chicago the construction and validity of which are involved in the case at bar. The issues in the two cases are identical. The paper milk

container which is involved in the case pending in the United States District Court is precisely the same paper container which is involved in the case at bar, even to the identical printing which appears upon both of said containers.

The case pending in the United States District Court was instituted in that court on February 2, 1939. Thereafter said case was duly referred by the District Court to a Master in Chancery and extensive hearings upon the merits were had before the Master. The testimony of numerous expert witnesses in behalf of the plaintiff and of one expert witness in behalf of the defendants, was taken. The record in said case consists of 2214 pages of testimony and more than 90 exhibits which were offered and received in behalf of plaintiff and more than 30 exhibits which were offered and received in behalf of the defendants.

On December 19, 1939 the plaintiff's brief was filed with the Master in Chancery of the District Court, consisting of 191 printed pages. On January 27, 1940 the brief in behalf of the defendants was filed with the Master, consisting of 58 printed pages. On February 15, 1940 the reply brief of the plaintiff was filed with the Master, consisting of 58 printed pages. On April 27, 1940 the report of the Master in Chancery, recommending a decree in favor of the defendants and against the plaintiff, was filed in the office of the clerk of the United States District Court. A copy of said report of the Master in Chancery is attached hereto and marked "Exhibit A." On May 7, 1940 the objections of the plaintiff to the report of the Master were filed with the clerk of the United States District Court.

On May 14, 1940 I appeared in behalf of the defendants before the Honorable Charles E. Woodward, one of the

judges of the United States District Court, and requested the entry of a decree in accordance with the report of the Master in Chancery. At that time I urged that the court fix an early date for the hearing upon the objections of the plaintiff to the report of the Master and upon the motion of the defendants for the entry of a decree in accordance with the said report. At that time the attorney for *Fieldcrest Dairies, Inc.*, refused to agree to an early hearing upon the objections to the report of the Master and upon the motion of the defendants for the entry of a decree in accordance therewith and stated to the court that there was no urgency in connection with the disposition of the case.

Thereafter the complaint in the case at bar was filed.

WALTER V. SCHEAFER.

Subscribed and sworn to before me this 21st day of May, 1940.

(Seal)

Margaret M. Smith,  
Notary Public.

Exhibit "A", attached to affidavit is a copy of Master's Report filed April 25, 1940 in *Fieldcrest Dairies, Inc. v. City of Chicago, et al.*, U. S. Dist. Ct. No. 316, incorporated in record in *City of Chicago, et al. v. Fieldcrest Dairies*, Supreme Court of the United States, Oct. Term 1941, No. 706; Rec. 1710-1736.

## AFFIDAVIT OF LLOYD ARNOLD,

STATE OF ILLINOIS, }  
COUNTY OF COOK. }ss.

Lloyd Arnold, being first duly sworn on oath, says:

I am a member of the Board of Health of the City of Chicago and one of the defendants in this cause. I am a professor of the University of Illinois College of Medicine, in charge of the Department of Bacteriology and Public Health. I have held that position since 1927. I received my medical education at Tulane University Medical School in New Orleans, the University of London and Oxford University in England, the Institute of Tropical Medicine in Hamburg, Germany, and the Universities of Goettingen, Munich and Tuebingen, also in Germany. I also attended the medical school at Vanderbilt University in Tennessee. Prior to the time when I became associated with the University of Illinois I was Professor of Bacteriology, Pathology and Public Health at Loyola University Medical School in the City of Chicago.

I am familiar with the manufacture of paper for use in paper milk containers and with the subsequent steps in the processing and handling of that paper in the manufacture of paper milk containers. I am familiar also with the sanitary and bacteriological conditions existing in paper mills and in connection with the handling and processing of paper into paper milk containers.

Paraffined paper milk containers as presently available are uniformly absorbent. The effect of the absorbency of these containers is that any bacteria which are present in the walls of the paper container can be and are transmitted to the milk placed in the containers. Bacteria are present in the walls of paper milk containers. The sanitary condi-

tion of paper milk containers depends to a very considerable extent upon the degree of sanitation achieved by the paper mill in which the paper is manufactured.

The sanitary condition of the paper containers also depends upon the purity of the water supply used in the paper mill in which the paper is manufactured. The ordinary source of the water supply of a paper mill is river water which in almost all instances contains sewage. Sewage bacteria have been found in the water supply of the paper mill in which the paper used in making the containers involved in this case are produced.

The paper containers involved in this case contain toxic substances, namely, leads, which are used in the ink which is used in printing said containers. This ink, by a process known to the printing trade as "offsetting," is transmitted from the outside of one paper container blank to the inside of the one next adjacent.

The immersion of paper milk containers in paraffin does not have a bactericidal effect and no effective bactericidal treatment is given to paper milk containers prior to the time when they are filled with milk.

In my opinion the requirement of the ordinance of the City of Chicago that milk sold in quantities of less than one gallon be delivered in standard milk bottles serves to protect the health of the inhabitants of the City of Chicago, and the use of paper milk containers of the type now available and of the type advocated by the plaintiff would involve hazards to public health greater in degree and less possible of ascertainment and correction than are involved in the use of standard milk bottles.

From the point of view of the protection of the public health, a container in which milk is delivered should meet the following requirements:

(a) The surface of the container in contact with milk shall be smooth and unbroken. The surface of the container in contact with milk shall be impermeable and non-porous.

(b) The surface of the container in contact with milk shall be sterile or constructed of such materials that it can be disinfected in the dairy before use.

(c) The contents of the container shall not be contaminated by microorganisms, chemicals or other substances contained in the material forming the wall.

The paper containers presently available, including the container advocated by the plaintiff, do not meet these requirements.

(Signed) LLOYD ARNOLD.

Subscribed and sworn to before me this 21st day of May,  
1940.

(Seal)

Margaret M. Smith,  
*Notary Public.*

Forasmuch as the matters and things above set forth do not fully appear of record, the defendants tender this, the report of the proceedings at the trial in the above entitled cause, consisting of the affidavits submitted by the defendants on the hearing before the court upon the motion of the plaintiff for the issuance of a temporary injunction, and pray that the same may be signed, sealed and certified as correct by the Honorable William V. Brothers, Trial Judge; and the undersigned being said Trial Judge hereby certifies that upon the hearing of said motion there were submitted to the court the sworn complaint of the plaintiff, the sworn answer of the defendants, and the foregoing affi-

davits; that no other evidence was offered upon the hearing of said motion.

W.M. V. BROTHERS,

*Judge of the Circuit Court of  
Cook County.*

Dated May 21, 1940.

Approved:

DENNIS J. O'TOOLE,

*Attorney for Plaintiff-Appellee.*

BARNET HODES,

*Corporation Counsel.*

WALTER V. SCHAEFER,

*Assistant Corporation Counsel,*

*Attorneys for Defendants-Appellants.*

#### **Text of Temporary Injunction Entered May 21, 1940.**

This cause coming on to be heard upon the motion of the plaintiff for the issuance of a temporary injunction against the defendants, City of Chicago, a Municipal Corporation; Edward J. Kelly, as Mayor of the City of Chicago; James P. Allman, as Commissioner of Police; Board of Health of the City of Chicago; Herman N. Bundesen, as President of the Board of Health of the City of Chicago; and Francis A. Dulak, Harry J. Reynolds, Louis E. Schmidt and Lloyd Arnold, as members of the Board of Health of the City of Chicago, due notice of said motion having been served upon said defendants, the court having considered the verified complaint heretofore filed herein by the plaintiff, having heard the arguments of counsel and being fully advised in the premises, and

The Court finds that the single service containers or "Pure Pak" containers used by plaintiff are within the

contemplation of the term "standard milk bottles," as used in the Municipal Code of the City of Chicago.

It Is Ordered, Adjudged and Decreed that a writ of injunction issue forthwith directed to and restraining and enjoining the defendants, City of Chicago, a Municipal corporation; Edward J. Kelly, as Mayor of the City of Chicago; James P. Allman, as Commissioner of Police; Board of Health of the City of Chicago; Herman N. Bundesen, as President of the Board of Health of the City of Chicago; and Francis A. Dulak, Harry J. Reynolds, Louis E. Schmidt and Lloyd Arnold, as members of the Board of Health of the City of Chicago, and each of them from:

- (a) In any manner or by any means from interfering with, obstructing, or hindering the plaintiff from the sale and distribution of its Grade "A" Pasteurized milk or milk products in single service containers or containers known as "Pure-Pak" containers within the City of Chicago, on the ground that they are not standard milk bottles.
- (b) From prosecuting the plaintiff in any action at law or in equity or in any criminal action purporting or alleged to arise out of the so-called violation by plaintiff of the ordinances of the Municipal Code of the City of Chicago regarding the sale of Grade "A" pasteurized milk in single service containers or "Pure-Pak" containers in the City of Chicago.
- (c) From arresting, molesting, annoying, injuring, harming, or abusing plaintiff or its officers, agents, and servants in the sale and distribution of plaintiff's Grade "A" pasteurized milk and milk products in single service containers or "Pure-Pak" containers within the City of Chicago.
- (d) From confiscating, damaging, injuring or destroying any or all of plaintiff's Grade "A" pasteurized milk

or milk products contained in single service containers or "Pure-Pak" containers which at any time or times may be within the corporate confines of the City of Chicago.

(e) From continuing to refuse and failing to issue to the plaintiff a permit to pasteurize Grade "A" milk at its plant in Chemung, Illinois, and from continuing to refuse and failing to issue to the plaintiff a license to sell, offer for sale, expose for sale, dispose of, exchange, or deliver, the Grade "A" pasteurized milk or milk products of plaintiff packaged and contained in containers known as single service containers or "Pure-Pak" containers.

*It Is Further Ordered* that said writ of injunction issue upon the plaintiff's filing herein a bond in the sum of \$500.00 with surety thereon, to be approved by the court within 5 days from date hereof.

*It Is Further Ordered, Adjudged and Decreed* that said injunction remain in force and effect until dissolved or altered by order or decree of this court.

*It Is Further Ordered, Adjudged and Decreed* that any notice of appeal filed by the defendants shall operate as a supersedeas without bond.

Enter:

W.M. V. BROTHERS,

*Judge.*

Dated: May 21, 1940.

#### Text of Notice of Appeal Filed May 21, 1940.

City of Chicago, a Municipal Corporation; Edward J. Kelly, as Mayor of the City of Chicago; James P. Allman, as Commissioner of Police; Board of Health of the City of Chicago; Herman N. Buedesen, as President of the Board of Health of the City of Chicago; and Francis A. Dulak,

Harry J. Reynolds, Louis E. Schmidt and Lloyd Arnold, as members of the Board of Health of the City of Chicago, defendants-appellants, hereby appeal to the Appellate Court of Illinois, First District, from the interlocutory order of the Circuit Court of Cook County entered in this cause on the 21st day of May, 1940, wherein the court, after considering the sworn complaint of the plaintiff, the sworn answer of the defendants, and certain affidavits submitted by the defendants, held for the plaintiff-appellee, Dean Milk Company, an Illinois Corporation, and ordered, adjudged and decreed:

That a writ of injunction issue forthwith restraining and enjoining the defendants and each of them from:

- (a) In any manner or by any means from interfering with, obstructing, or hindering the plaintiff from the sale and distribution of its Grade "A" Pasteurized milk or milk products in single service containers or containers known as "Pure Pak" containers within the City of Chicago, on the ground that they are not standard milk bottles.
- (b) From prosecuting the plaintiff in any action at law or in equity or in any criminal action purporting or alleged to arise out of the so-called violation by plaintiff of the ordinances of the Municipal Code of the City of Chicago regarding the sale of Grade "A" pasteurized milk in single-service containers or "Pure-Pak" containers in the City of Chicago.
- (c) From arresting, molesting, annoying, injuring, harming, or abusing plaintiff or its officers, agents, and servants in the sale and distribution of plaintiff's Grade "A" pasteurized milk and milk products in single-service containers or "Pure-Pak" containers within the City of Chicago.
- (d) From confiscating, damaging, injuring or destroying any or all of plaintiff's Grade "A" pasteurized milk.

or milk products contained in single-service containers or "Pure-Pak" containers which at any time or times may be within the corporate confines of the City of Chicago.

(e) From continuing to refuse and failing to issue to the plaintiff a permit to pasteurize Grade "A" milk at its plant in Chemung, Illinois, and from continuing to refuse and failing to issue to the plaintiff a license to sell, offer for sale, expose for sale, dispose of, exchange, or deliver, the Grade "A" pasteurized milk or milk products of plaintiff packaged and contained in containers known as single service containers or "Pure-Pak" containers.

The defendants-appellants pray that said order may be reversed.

**City of Chicago, a Municipal Corporation;**  
**Edward J. Kelly, as Mayor of the City of**  
**Chicago; James P. Allman, as Commis-**  
**sioner of Police of the City of Chicago;**  
**Board of Health of the City of Chicago;**  
**Herman N. Bundesen, as President of the**  
**Board of Health of the City of Chicago;**  
**and Francis A. Dulak, Harry J. Reynolds,**  
**Louis E. Schmidt and Lloyd Arnold, as**  
**members of the Board of Health of the**  
**City of Chicago.**

**By BARNET HODES,**

*Corporation Counsel,*

**WALTER V. SCHAEFER,**

*Assistant Corporation Counsel,*

*Attorneys for Defendants-Appellants.*

**B. APPELLATE COURT PROCEEDINGS—MAY 22 TO JUNE 4, 1940.**

**STATEMENT OF COUNSEL SUMMARIZING APPELLATE COURT PROCEEDINGS.**

Section 78 of the Illinois Civil Practice Act (Illinois Revised Statutes 1941, Chapter 110, "Practice," Para. 202), provides for an appeal from an interlocutory order granting an injunction. The statute cited provides that such interlocutory order and the proceedings in the court below shall not be stayed during the pendency of such appeal except upon order of the Appellate Court or of a judge thereof in vacation.

The appeal of the defendants from the interlocutory injunction of the Circuit Court of Cook County was docketed in the Appellate Court of Illinois for the First District under the title of "Dean Milk Company, an Illinois Corporation, Appellee, vs. City of Chicago, a municipal corporation, *et al.*, Appellants, General Number 41348," on May 22, 1940.

On the same day, upon due notice, the defendants, including the City of Chicago, made a motion in the Appellate Court to enter an order staying the force and effect of the interlocutory injunction of the Circuit Court of Cook County entered May 21, 1940. In support of said motion the defendants filed suggestions under oath stating, among other things, that the trial court should not have entered the injunction because of the pendency of the proceedings in the United States District Court referred to in paragraph 12 of the defendants' answer and referred to in the affidavit in opposition to the motion for a temporary injunction.

On the same day, May 22, 1940, the Appellate Court entered an order that having examined the record filed herein and the arguments of counsel, the injunctional order of May 21, 1940, of the Circuit Court of Cook County should be stayed without bond pending the final disposition of the appeal in the Appellate Court.

On May 29, 1940, upon due notice, the plaintiff, Dean Milk Company, a corporation, of which Fieldcrest Dairies, Inc., is a wholly-owned subsidiary, confessed in writing "that there was manifest error in the rendition of the interlocutory order of the Circuit Court of Cook County entered on May 21, 1940, from which the appeal is prosecuted in this cause" and made a motion to reverse the interlocutory order.

On the same day, May 29, 1940, the City of Chicago and other defendants moved the Appellate Court:

"(1) To include in the order of this Honorable Court reversing said order of May 21, 1940, directions to the trial court to dismiss the cause in that court on the ground that the plaintiff-appellee has an adequate remedy at law;

"(2) In the event of the refusal by this Honorable Court to direct the dismissal of the above entitled cause as aforesaid, then these defendants-appellants move this Honorable Court to include in its order, reversing said order of May 21, 1940, directions to the trial court to stay proceedings in the above entitled cause until the determination of the suit pending in the United States District Court for the Northern District of Illinois, Eastern Division."

On May 31, 1940, the plaintiff, Dean Milk Company, filed counter-suggestions in opposition to said motion of the appellants (defendants).

On June 3, 1940, the defendants filed a written reply to the plaintiff's suggestions in which among other things the defendants stated:

"Our motion that this Honorable Court direct the trial court to stay proceedings in the above entitled cause until the determination of the suit pending in the United States District Court, does not ask this court to pass upon the merits of this case. Such an order would not affect in any manner or to any extent the right of the plaintiff-appellee to obtain at the proper time all remedy sought by its suit if it shall show itself to be entitled thereto.

"This was an action in equity in the trial court and it is an action in equity on this appeal. The record in this case discloses a situation (discussed under Point IV of Appellants' brief, pp. 31-34) which should have persuaded the trial court, sitting in chancery, and should now persuade this Honorable Court, on this chancery appeal, to stay proceedings in this cause until the litigation in the Federal court can be determined. The City of Chicago incurred considerable expense in the Federal court litigation instituted and carried on by the wholly owned subsidiary of the plaintiff in the case at bar. The case at bar involves the same issues and the same paper carton. The paper carton attached as an exhibit to the plaintiff's pleading in this case is a duplicate of the paper carton attached as an exhibit to the pleading of the plaintiff in the Federal court case. Every equitable consideration arising from the facts in this case is favorable to the contention of the city that it should not be forced to bear the repetition of the expense of a protracted trial because of any alleged urgency connected with the case, in view of the action of the wholly owned subsidiary of the plaintiff in preventing an early determination of the Federal court litigation by insisting that there was no urgency.

"The necessity for the exercise by this court of the power granted to it to 'direct such proceedings to be had in the court below as the justice of the case may require,' and in the exercise of that power to direct the trial court to stay proceedings herein until the litigation in the Federal court can be determined, is indicated by two statements made in the suggestions of the plaintiff-appellee."

On June 4, 1940, the Appellate Court entered two orders which were as follows:

"On this day came again the said parties, and the Appellee having admitted and confessed that in the Record and proceedings aforesaid, and in the rendition of the Interlocutory Order of May 21, A. D. 1940 aforesaid there is Manifest Error: Therefore, it is considered by the Court that for that Error the Interlocutory Order of May 21, A. D. 1940, of the Circuit Court of Cook County in this behalf rendered, be reversed anulled, set aside and wholly for nothing esteemed in accordance with the confession of error filed herein.

"And it is further considered by the Court that the said Appellants recover of and from the said Appellee their costs by them in this behalf expended, to be taxed, and that they have execution therefor."

"The Court having considered Appellants' motion to include in the order of reversal an order directing the trial Court to dismiss the cause or to include in its order of reversal an order directing the trial court to stay proceedings in the above entitled cause until the determination of the suit pending in the United States District Court of the Northern District of Illinois, Eastern Division, as per suggestions filed herein, and having also considered the counter-suggestions of the Appellee to said motion, as well as Appellants' reply to said counter-suggestions filed herein, and being now fully advised in the premises doth order that said motion be and the same is hereby denied."

**C. CIRCUIT COURT PROCEEDINGS—JUNE 18 TO  
DECEMBER 3, 1940.**

**STATEMENT OF COUNSEL SUMMARIZING FURTHER TRIAL COURT  
PROCEEDINGS.**

On June 18, 1940, the mandate of the Appellate Court reciting the reversal entered in that court June 4, 1940, was filed in the Circuit Court of Cook County and further proceedings were had in that court as follows:

Upon due notice, on the same day, June 18, 1940, the plaintiff filed an Amended and Supplemental Complaint consisting of two parts. The first part made substantially the same allegations as the original Complaint except that it alleged that on June 13, 1940, the City of Chicago had refused to issue a permit to the plaintiff, Dean Milk Company, to pasteurize and to sell within the City of Chicago its Grade A milk packed in single-service containers, "giving as an alleged reason for its said refusal that 'no facilities existed for the washing and filling of standard milk bottles' in plaintiff's plant at Chemung, Illinois, and because plaintiff is 'not prepared to distribute milk or milk products in standard milk bottles' from its plant in Melrose Park, Illinois." True copies of said refusals dated June 13, 1940, were attached to the Amended and Supplemental Complaint as Exhibits E and F. Exhibit E contained the language quoted in the allegation just mentioned prefaced by this statement:

"An inspection of the plant and equipment was made on June 4, and it was found that this is the same plant for which a milk plant permit application was made in the name of Fieldcrest Dairies, Inc., a division of the Dean Milk Co., subsequent to which inspections were made a short time ago, when it was found that no facilities existed," etc.

Part two of said Amended and Supplemental Complaint was a separate action at law by the same plaintiff praying that a writ of mandamus be issued to compel the defendants to issue to the plaintiff a license to pasteurize and to sell milk in containers "known as single-service or 'Pure-Pak' containers." Part two of the Amended and Supplemental Complaint adopted the allegations of part one by reference and alleged generally that the plaintiff had complied in all particulars with all requirements entitling it to the issuance of a permit for the sale of milk in single-service or Pure-Pak containers within the City of Chicago.

On June 25, 1940, the defendants, upon due notice to the plaintiff, filed a motion in writing "that this Honorable Court stay proceedings in this case pending the disposition of the case entitled '*Fieldcrest Dairies, Inc., a corporation, Plaintiff v. City of Chicago, a municipal corporation, et al., Defendants,*' which is now pending as No. 316 in the District Court of the United States for the Northern District of Illinois, Eastern Division. And in support of said motion the defendants present herewith their sworn petition."

The said petition averred under oath the following, omitting the caption, signatures and verification:

**Text of Defendants' Petition to Stay Proceedings Filed  
June 25, 1940.**

The defendants, by Barnet Hodes, Corporation Counsel of the City of Chicago, their attorney, respectfully represent to this Honorable Court:

1. Fielderest Dairies, Inc., a Michigan corporation, authorized to do business in the State of Illinois, is a wholly owned subsidiary of the plaintiff in the case at bar, the

Dean Milk Company. On February 2, 1939 Fieldcrest Dairies, Inc., instituted a suit in the District Court of the United States for the Northern District of Illinois, Eastern Division, against the City of Chicago and its Board of Health, which suit is pending in said Court as *Fieldcrest Dairies, Inc., a corporation, plaintiff v. City of Chicago, a municipal corporation, et al., defendants*, No. 316. That case involves the identical paper milk container and the construction and validity of the identical provision of the ordinance of the City of Chicago which are involved in the case at bar.

2. In that case a full trial upon the merits has been had before a Master in Chancery duly appointed by the United States District Court. Upon that trial the testimony of very many expert witnesses was introduced with respect to the meaning and validity of the identical ordinance which is involved in this case and with respect to the sanitary and unsanitary characteristics of the Pure-Pak paper milk containers which are also involved in this case.

3. Two thousand two hundred and fourteen pages of testimony were taken in said case and more than 90 exhibits were offered and received in behalf of the plaintiff and more than 30 exhibits were offered and received in behalf of the defendants. After proofs were closed in said case a printed brief of 191 pages was filed in behalf of the plaintiff. Thereafter an answering printed brief of 58 pages was filed in behalf of the defendants. Subsequently a printed reply brief of 58 pages was filed in behalf of the plaintiff.

4. Thereafter, on April 27, 1940, the report of Honorable Jacob I. Grossman, Master in Chancery of the United States District Court for the Northern District of Illinois, was duly filed in said court. The report of said

Master in Chancery decided the issues (which are identical with the issues in the case at bar) in favor of the defendants. A copy of said report of the Master in Chancery is attached hereto, marked Exhibit 1. [Note: This is the report set forth in the record, Vol. III, pp. 1710-1736, *City of Chicago v. Fieldcrest Dairies, Inc.*, Oct. Term, 1941, No. 706, and is here omitted in printing.]

5. Thereafter, on May 7, 1940, the objections of plaintiff to the report of the Master in Chancery were duly filed with the Clerk of said court. Thereafter, on May 14, 1940, a motion was duly made in behalf of the defendants for the entry of a decree in accordance with said report. Upon the ground that there was no urgency in the disposition of the matter before the District Court, the plaintiff refused to agree to the defendants' request for a prompt hearing upon the objections to the report of the Master and the motion of the defendants for the entry of a decree. On the next day, May 15, 1940, the case at bar was instituted in this court.

6. The plaintiff in said case pending in the United States District Court is the wholly owned subsidiary of the plaintiff in the case at bar and is under the complete control and domination of the plaintiff in the case at bar. The disposition of the case pending in the United States District Court is being deliberately delayed by the plaintiff and its subsidiary in order to secure a re-trial of identical issues in the case at bar. All of the evidence necessary for the complete determination of the issues presented in the case at bar has been offered and received in the case pending in the United States District Court and a re-trial of those issues in the case at bar will result only in the imposition of additional expense upon the taxpayers of the City of Chicago.

Wherefore defendants pray that an order be entered by this Honorable Court staying proceedings in this case until the disposition of the case entitled *Fieldcrest Dairies, Inc. v. City of Chicago, et al.*, No. 316 in the District Court of the United States for the Northern District of Illinois, Eastern Division.

On June 25, 1940, an order was entered continuing the motion of the defendants to stay the proceedings to the first hearing of the contested motion calendar of the trial judge, in September, 1940.

On July 2, 1940, the defendants filed an answer to the amended and supplemental complaint, which, with respect to part one was identical with the original answer to the original complaint set forth above. The answer to part two, being the action at law in mandamus, adopted by reference the defendants' answer to paragraphs 1 to 25 of part one of the answer and denied generally the allegations that the plaintiff had complied with the requirements necessary for a license to sell milk in the City of Chicago in single-service or Pure-Pak containers and denied plaintiff's alleged right to a writ of mandamus. Said answer to the amended and supplemental complaint was under oath.

On July 3, 1940, on motion of the plaintiff, the cause was set for hearing on September 9, 1940.

On September 9, 1940, by leave of court, plaintiff filed a supplement to the Amended and Supplemental Complaint.

**Text of Supplement to Amended and Supplemental  
Complaint.**

Now comes the Plaintiff, Dean Milk Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, by Charles O. Rundall and Horace A. Young, its attorneys, and by leave of court first had and obtained files this its Supplement to Amended and Supplemental Complaint against the Defendants City of Chicago, a Municipal corporation; Edward J. Kelly, as Mayor of the City of Chicago; James P. Allman, as Commissioner of Police; Board of Health of the City of Chicago; Herman N. Bundesen, as President of the Board of Health of the City of Chicago; and Francis A. Dulak, Harry J. Reynolds, Louis E. Schmidt and Lloyd Arnold, as members of the Board of Health of the City of Chicago, and alleges as follows:

**SEPARATE ACTION IN CHANCERY.**

(1) That since the filing of its Amended and Supplemental Complaint herein on June 18, 1940, certain additional events have transpired which are material and pertinent to the issues involved in this cause, and in this its Supplement to Amended and Supplemental Complaint Plaintiff sets forth such additional events.

(2) That at a meeting of the Board of Health of the City of Chicago held at the offices of the Board on August 15, 1940, at which meeting the Defendants Herman N. Bundesen, Francis A. Dulak, Louis E. Schmidt and Lloyd Arnold were present, said Herman N. Bundesen presented to the Board a written memorandum of certain proceedings before the Board, consisting of ten (10) or more type-written pages. In said written memorandum, which Plain-

tiff will require said Defendants to produce upon the hearing of this cause, said Herman N. Bundesen stated in substance that the Board prepared a letter, dated June 3, 1940, to be sent to Plaintiff in which letter the Board stated that before action would be taken by the Board upon the request of Plaintiff for the issuance of certain permits, the Board wished to be informed that it was the plan of Plaintiff to distribute milk and milk products in the City of Chicago in standard milk bottles and not in single-service containers, but, that upon the advice of Fred V. Maguire, Assistant Corporation Counsel of the City of Chicago, said letter was never sent. Said Defendant further stated that acting upon the advice of said Fred V. Maguire and with the assistance of said Fred V. Maguire, the Board prepared and sent to Plaintiff the letter dated June 13, 1940, a copy of which is attached to the Amended and Supplemental Complaint heretofore filed herein as "Exhibit E" thereto, in which letter the reason for the refusal of the permits was given as the lack of facilities for the washing and filling of standard milk bottles. Said Defendant further stated that the Board had been informed that subsequent to June 13, 1940, Plaintiff had made alterations in its plant to provide equipment for washing and filling standard one-half gallon glass containers for milk and milk products, to be distributed to prospective customers in Chicago until the use of paper containers shall be approved and that on August 4, 1940, Inspector A. W. Kitley inspected said plant and found that the plant, equipment and methods were in full compliance with the ordinances and the rules and regulations of the Board of Health. After a discussion of the memorandum presented by said Herman N. Bundesen and the matters therein contained, the Board unanimously passed the following resolutions:

"BE IT RESOLVED, that milk plant and milk distributor's permits (Numbered 37) be issued to the Dean Milk Company."

"BE IT RESOLVED, that the application of the Dean Milk Company for a milk distributor's license be approved and the City Collector so advised."

(3) That pursuant to said resolutions there were issued to Plaintiff on August 16, 1940, a milk plant permit for its plant at Chemung, Illinois, a photostatic copy of which permit is hereto attached, marked "Exhibit A" and hereby made a part hereof, a milk distributor's permit at 2511 West Lake Street, Melrose Park, Illinois, a photostatic copy of which is hereto attached, marked "Exhibit B" and hereby made a part hereof, and permits for five vehicles, Nos. 27 to 31, inclusive.

(4) That on August 22, 1940, there was also issued to Plaintiff a food distributor's permit for a store located at 3819 Southport Avenue, Chicago, Illinois, and pursuant to such permit Plaintiff opened said store for business on August 23, 1940, and there offered for sale various dairy and poultry products. On Thursday, August 29, 1940, Plaintiff announced that on Friday, August 30, 1940, it would sell at its said store located at 3819 Southport Avenue, Chicago, Illinois, its Grade A pasteurized milk and milk products packaged in single-service containers commonly known as paper bottles, and that such announcement was made by means of hand bills distributed in the vicinity of said store and by a statement sent to the public press and to the Board of Health.

(5) That pursuant to said announcement Plaintiff did on Friday, August 30, 1940, proceed to offer for sale and sell its Grade A pasteurized milk and milk products packaged in single-service containers commonly known as paper bottles at its said store and continued such sales

until the late afternoon of that day. Plaintiff learned at or about 3:00 o'clock in the afternoon of that day that a special meeting of the Board of Health had been called to consider the revocation of the permits theretofore issued to Plaintiff as above described. Present at such meeting of the Board of Health were the Defendants Herman N. Bundesen, Harry J. Reynolds and Louis E. Schmidt, and also one Fred V. Maguire, Assistant Corporation Counsel. Dairy Inspector Kruger reported to the Board that Plaintiff had on that day sold milk in single-service containers, commonly known as paper bottles, in the City of Chicago in alleged violation of the ordinances of the City of Chicago and that therefore he recommended the revocation of the permits theretofore issued to Plaintiff; that thereupon the Defendant Herman N. Bundesen inquired of said Fred V. Maguire, Assistant Corporation Counsel, as to whether or not the Board of Health had any alternative in the matter of revoking the permits and that said Fred V. Maguire then and there advised said Herman N. Bundesen and the other members of the Board present that the Board had no alternative of any kind in the premises and that the Board was obligated by law to revoke such permits; that thereupon, and over the vigorous protests and objections of Plaintiff's representatives, a resolution was unanimously passed by the three members of the Board present purporting to revoke such permits. Plaintiff alleges that it had fully complied with all lawful requirements entitling it to the above described permits, and after the issuance of said permits Plaintiff did no act which warranted any revocation thereof, and the action of the Defendant Board of Health and said individual Defendants as members of the Board of Health was wrongful and without warrant in law.

(6) That since the purported revocation of said permits, Plaintiff has not sold any of its Grade A pasteurized milk and milk products in the City of Chicago.

(7) That since the purported revocation of said permits, the Defendants have failed and refused to rescind the purported revocation and have failed and refused to issue new permits to Plaintiff.

WHEREFORE, Plaintiff prays for the same relief as prayed for in its Amended and Supplemental Complaint filed herein and that Defendants be ordered and directed to rescind their action in connection with such purported revocation and to restore or re-issue to Plaintiff said permits and for such other, further and different relief as the foregoing allegations may justify and to the Court may seem meet.

#### SEPARATE ACTION AT LAW.

Now comes Dean Milk Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois, by Chas. O. Rundall and Horace A. Young, its attorneys, and complains of all the Defendants above named and alleges as follows:

(1) Pursuant to Rule 11 of the Rules of Practice of the Supreme Court of Illinois, Plaintiff hereby adopts by this reference thereto all of the allegations made in paragraphs (1) to (7) of the above and foregoing Supplement to Amended Supplemental Complaint and by this reference thereto hereby incorporates all of said allegations into this separate action at law.

(2) Plaintiff has complied in all particulars with all requirements entitling it to the issuance or re-issuance of a permit or license to pasteurize and to sell, offer for sale, expose for sale, dispose of, exchange or deliver the

Grade A Pasteurized milk or milk products of Plaintiff packaged or contained in containers known as single-service containers or "Pure-Pak" containers, commonly known as paper bottles, within the City of Chicago.

WHEREFORE, Plaintiff prays for the same relief prayed for in its Amended and Supplemental Complaint filed herein or in the alternative that a writ of mandamus be issued directing and compelling said Defendants Board of Health of the City of Chicago, Herman N. Bundesen as President of the Board of Health of the City of Chicago, and Francis A. Dulak, Harry J. Reynolds, Louis E. Schmidt and Lloyd Arnold as members of the Board of Health of the City of Chicago, to restore or re-issue to the Plaintiff said permits or licenses which are purported to have been so revoked and for such other and further relief as to the Court may seem meet in the premises.

**DEAN MILK COMPANY, an Illinois Corporation,**  
 By (Signed) SAM E. DEAN,  
*Its President and Duly Authorized Agent.*

(Signed) CHAS. O. RUNDALL,

(Signed) HORACE A. YOUNG,

*Attorneys for Plaintiff.*

Attached to said Supplement to Amended and Supplemental Complaint as exhibits were two permits dated August 15, 1940, bearing Permit No. 37, issued by the Board of Health, City of Chicago, the first permit reciting in substance the following:

"A Permit is hereby granted to Dean Milk Co., Chemung, Illinois subject to ordinances of the City of Chicago, and the rules and regulations of the Board of Health of the City of Chicago, to operate a Milk Plant."

"This permit may be revoked when the holder thereof fails to comply with any of the ordinances of the City of Chicago or rules and regulations of the Board of Health of the City of Chicago.

"This permit is not transferable and is issued only for the person and premises named herein.

"By Direction of the Board of Health."

The second permit recited in substance the following:

"A Permit is hereby granted to Dean Milk Co., 2541 West Lake Street, Melrose Park, Illinois, subject to ordinances of the City of Chicago, and the rules and regulations of the Board of Health of the City of Chicago, to operate as a Milk Distributor."

The balance of the permit was the same as the previous exhibit.

On September 9, 1940, the hearing on defendants' motion for a stay of proceedings pending disposition of the case of Fielderest Dairies, Inc., against City of Chicago, United States District Court No. 316, was continued to October 21, 1940.

On September 19, 1940, the defendants filed their answer to the supplement to the amended and supplemental complaint, which, omitting the introductory matter and signatures, was as follows:

**Answer to Supplement to Amended and Supplemental Complaint.**

**ANSWER TO SEPARATE ACTION IN CHANCERY.**

- (1) Defendants deny that any events alleged in said supplement to have occurred after the filing of the plaintiff's amended and supplemental complaint herein are material or pertinent to the issues involved in this cause.

- (2) Defendants admit the allegations of paragraph 2 of said supplement.
- (3) Defendants admit the allegations of paragraph 3 of said supplement.
- (4) Defendants admit the allegations of paragraph 4 of said supplement.
- (5) Defendants admit the allegations of paragraph 5 of said supplement excepting as to the following:

Defendants deny the allegation that the defendant, Herman N. Bundesen, at the meeting of the Board of Health held August 30, 1940, enquired of Fred V. Maguire, Assistant Corporation Counsel, as to whether or not the Board of Health had any alternative in the matter of revoking the permits theretofore issued to the plaintiff, and further deny that said Fred V. Maguire then and there advised said Herman N. Bundesen and the other members of the Board of Health present, that the board had no alternative of any kind in the premises or that the board was obligated by law to revoke said permits or that any advice given said Herman N. Bundesen, and the other members of the Board of Health present, by said Fred V. Maguire concerning the revocation of said permits was in subject or effect as alleged in said supplement.

Defendants state that the resolution unanimously adopted by the members of the Board of Health, present did legally revoke and terminate the permits theretofore issued to the plaintiff by the said board.

Defendants deny that after the issuance of said permits the plaintiff did no act which warranted any revocation thereof and further deny that the action of said Board of Health, and the members thereof as such, was wrongful or without warrant in law.

Defendants further state the fact to be that the sale of milk by the plaintiff in quantities of less than one gallon in paper containers, sometimes known as single-service containers, and not in standard milk bottles, was in violation of the ordinance of the City of Chicago in such case made and provided.

(6) Defendants have no knowledge or information sufficient to form a belief with respect to the truth of the allegations of paragraph 6 of said supplement and therefore neither admit nor deny said allegations but ask that the plaintiff may be required to make strict proof thereof if upon the trial of this cause said allegations shall be relevant or material.

(7) Defendants admit that the revocation of said permits has not been rescinded but state that no demand or request that said revocation be rescinded has been made upon or to said Board of Health by the plaintiff.

#### ~~ANSWER TO SEPARATE ACTION AT LAW.~~

1. With respect to paragraph 1 of the separate action at law, the defendants adopt by this reference thereto their answer to paragraphs 1 to 7, both inclusive, to the separate action in chancery contained in the supplement to amended and supplemental complaint and by this reference thereto incorporate all of said answer.

2. Defendants deny the allegations of paragraph 2 of the separate action at law.

[On October 18, 1940, United States District Judge Charles E. Woodward filed a memorandum directing the entry of a decree in favor of Fielderest Dairies, Inc., against the City of Chicago and other defendants, Rec. Vol. III, pp. 1752-1756, *City of Chicago, et al., Petitioners*,

v. *Fieldcrest Dairies, Inc., Respondent*, October Term, 1941, No. 706.]

On October 21, 1940, the hearing of the state court proceeding was postponed by the Circuit Court of Cook County to October 22, 1940, on which day the hearing was again continued to October 23, 1940.

[On October 23, 1940, the United States District Judge entered findings of fact, conclusions of law and the decree now under review by the Supreme Court of the United States, Rec. Vol. III, pp. 1758-1761, *City of Chicago, et al., Petitioners, v. Fieldcrest Dairies, Inc., Respondent*, October Term, 1941, No. 706.]

On October 23, 1940, and dates following, the Circuit Court of Cook County postponed the state court proceeding from time to time until November 29, 1940, on which date the plaintiff, Dean Milk Company, filed a sworn petition.

#### **Text of Plaintiff's Petition Filed November 29, 1940.**

Your Petitioner, Dean Milk Company, respectfully represents:

(1) That heretofore and on to-wit, May 15, 1940, Plaintiff filed its Complaint in Chancery herein, asking for injunctive and other relief, and that thereafter and on May 21, 1940, an Interlocutory Injunction was entered herein, from which an appeal was taken by Defendants, or some of them, to the Appellate Court of Illinois; that thereafter error was confessed in the Appellate Court of Illinois on behalf of Plaintiff, and said cause was remanded and redocketed in this court.

(2) Thereafter and on June 18, 1940, Plaintiff filed herein its Amended and Supplemental Complaint by leave

of court first had and obtained, praying for injunctive relief and for relief by way of mandamus, all of which will more fully appear from the files and pleadings filed in said cause.

(3) Thereafter and on June 25, 1940, the Defendants filed herein their motion, supported by verified petition, to stay the proceedings in the above entitled cause pending the disposition of a certain suit or proceeding then pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, known and described as "*Fieldcrest Dairies, Inc., a corporation, Plaintiff, v. City of Chicago, a Municipal corporation, et al., Defendants, No. 316.*" In said petition it was alleged that the suit just described "involves the identical paper milk container and the construction and validity of the identical provision of the ordinance of the City of Chicago which are involved in the case at bar." Said petition recited certain proceedings had in said cause pending in the District Court of the United States, and further alleged, among other things:

"All of the evidence necessary for the complete determination of the issues presented in the case at bar has been offered and received in the case pending in the United States District Court and a re-trial of those issues in the case at bar will result only in the imposition of additional expense upon the taxpayers of the City of Chicago.

"Wherefore defendants pray that an order be entered by this Honorable Court staying proceedings in this case until the disposition of the case entitled *Fieldcrest Dairies, Inc. v. City of Chicago, et al., No. 316* in the District Court of the United States for the Northern District of Illinois, Eastern Division."

(4) By order entered on June 25, 1940; hearing on said motion and petition was continued, to be taken up thereafter, and on July 2, 1940, Defendants filed herein their

Answer to the Amended and Supplemental Complaint of Plaintiff theretofore filed herein on June 18, 1940.

(5) Said motion and petition to stay proceedings herein came on for hearing before the Court on September 9, 1940, and after being partially heard were ordered continued for further hearing at 10:00 o'clock A. M. on October 25, 1940.

(6) On September 9, 1940, by leave of court first had and obtained, Plaintiff filed herein its Supplement to its Amended and Supplemental Complaint heretofore filed herein; and thereafter and on September 19, 1940, Defendants filed their Answer to the Supplement to the Amended and Supplemental Complaint aforesaid.

(7) On October 18, 1940, after full hearing in the District Court of the United States of the said cause of *Fieldcrest Dairies, Inc. v. City of Chicago*, No. 316, the Honorable Charles E. Woodward rendered a decision in said cause, a copy of which is attached hereto, marked Exhibit "A" and by this reference thereto, hereby made a part hereof.

(8) Thereafter, and on October 23, 1940, the Honorable Charles E. Woodward entered certain Findings of Fact and Conclusions of Law in said cause, and a Final Decree, true copies of which Findings of Fact, Conclusions of Law and Final Decree are attached hereto, marked Exhibits "B," "C" and "D," respectively, and by this reference thereto, hereby made a part hereof.

(9) Thereafter, Defendants, City of Chicago, et al., filed their notice of appeal from said Decree entered by the said Honorable Charles E. Woodward on October 23, 1940, and made application to stay the force and effect of said Decree pending said appeal, which application was denied.

(10) Thereafter, and on October 25, 1940, Defendants in said Federal Court cause filed a short record in the United States Circuit Court of Appeals for the Seventh Circuit, which was thereupon docketed as "*Fieldcrest Dairies, Inc., a corporation, Plaintiff-Appellee v. City of Chicago, a Municipal corporation, et al., Defendants-Appellants, No. 7402*" in said court.

(11) Defendants, through their counsel, made application to the United States Circuit Court of Appeals for the Seventh Circuit, for the entry of an order granting supersedeas staying the force and effect of the Final Decree theretofore entered by the Honorable Charles E. Woodward, hereinabove fully described, and a copy of which is attached hereto marked Exhibit "D."

(12) Thereafter the application for supersedeas so made by said Defendants to the United States Circuit Court of Appeals was denied, leaving said Final Decree, Exhibit "D" hereto, in full force and effect.

(13) Petitioner further shows that, as hereinabove more fully set forth, it was represented to this Court that the disposition of said cause in the United States District Court would determine the issues presented in this cause and that said issues should not be re-tried herein, but should abide the determination of said issues in said Federal Court proceeding.

(14) Petitioner further represents that it is informed and believes and therefore states the fact to be that said appeal No. 7502 is still pending in the United States Circuit Court of Appeals and the determination thereof may be delayed for several months.

(15) Petitioner further represents that it is informed, believes and therefore states the fact to be that since

the entry of the decree, Exhibit "D" hereto, competitors of Petitioner have engaged in the sale of milk and milk products in paper bottles or single-service containers within the corporate limits of the City of Chicago without hindrance or molestation from the Defendants, or any of them. Petitioner seeks the right to use paper bottles or single-service containers, identical in all respects with those involved in and approved by said Federal District Court decree, whereas its competitors are using containers of a different type and make which have not been subjected to the same critical examination. Petitioner is thereby placed at a great disadvantage in the sale of its milk and milk products due to the failure and refusal of Defendants to issue or re-issue or restore to Petitioner the permits which are required under the ordinance of the City of Chicago as a prerequisite to engaging in the sale and distribution of milk and milk products within the corporate limits of the City of Chicago.

Petitioner therefore prays that an order be entered herein granting to Plaintiff the relief prayed for in its Amended and Supplemental Complaint as amended, heretofore filed herein, and that this Court retain jurisdiction of this controversy pending the final determination of said appeal No. 7502 now pending in the United States Circuit Court of Appeals, to the end that should said Decree from which said appeal is taken be affirmed, the order now to be entered herein shall become final, and should said Decree of the United States District Court be reversed or modified by the United States Circuit Court of Appeals in said case No. 7502, then that this cause shall stand for further hearing herein.

And your Petitioner will ever pray.

DEAN MILK COMPANY,  
By CHAS. O. RUNDALL,  
*Its Attorneys.*

CHAS. O. RUNDALL,

HORACE A. YOUNG,

*Attorneys for Petitioner,  
Dean Milk Company.*

Attached to said petition as Exhibit "A" was the memorandum dated October 18, 1940, of Woodward, U. S. District Judge, and as Exhibits "B," "C," and "D," respectively, copies of the findings of fact, conclusions of law and decree of the United States District Court, per Woodward, District Judge, entered October 23, 1940, which are here omitted in printing because included in the Record (Vol. 3, pp. 1756-1761) of *City of Chicago, et al., Petitioner, v. Fieldcrest Dairies, Inc., Respondent*, October Term, 1941, No. 706..

On due notice, the Circuit Court of Cook County entered an order on December 3, 1940.

#### Text of Order of December 3, 1940.

This matter coming on to be heard upon the Amended and Supplemental Complaint of Plaintiff heretofore filed herein and the Answer of the Defendants filed thereto, and upon the Supplement to the Amended and Supplemental Complaint and the Answer of the Defendants thereto, and upon the Petition of the Defendants heretofore filed herein on June 25, 1940, praying that the above entitled cause

abate pending the disposition of a certain cause or proceeding then pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, known as *Fieldcrest Dairies, Inc.*, Plaintiff v. *City of Chicago, et al.*, Defendants, No. 316, and upon the Petition of Plaintiff filed herein on November 29, 1940, upon notice to counsel for the Defendants and continued for hearing until this date, and the Court having examined said pleadings and Petitions and having heard arguments of counsel, and now being fully advised in the premises, Finds that the allegations of the Petition of Plaintiff filed herein on November 29, 1940, are true and that Defendants neither consent nor object to the entry of this order, but have agreed in open court that no interlocutory appeal shall be taken therefrom,

It Is Therefore, Ordered, Adjudged and Decreed as follows:

(1) That the Defendants and each of them, and their officers, attorneys, agents, inspectors, employees and all persons acting in privity with them, or any of them, be and they are hereby restrained and enjoined from—

(a) In any manner, or by any means, interfering with, obstructing or hindering the Plaintiff from the sale and distribution of its Grade A pasteurized milk or milk products in single-service containers or containers known as "Pure-Pak" containers, within the City of Chicago, provided that the sale and distribution of said milk and milk products otherwise conforms with the applicable ordinances of the City of Chicago and the statutes of the State of Illinois;

(b) Prosecuting Plaintiff, its officers, agents, employees and all persons acting in privity with them, or

any of them, in any action in law or in equity, or in any criminal action purporting or alleged to arise out of the so-called violation by Plaintiff of the ordinances or the Municipal Code of the City of Chicago regarding the sale of its Grade A pasteurized milk or milk products in single-service containers or containers known as "Pure-Pak" containers, within the City of Chicago, provided that the sale and distribution of said milk and milk products otherwise conforms with the applicable ordinances of the City of Chicago and the statutes of the State of Illinois;

(c) Arresting, molesting, annoying, injuring, harming or abusing Plaintiff or its officers, agents or servants in the sale and distribution of Plaintiff's Grade A pasteurized milk and milk products in single-service containers or "Pure-Pak" containers within the City of Chicago, provided that the sale and distribution of said milk and milk products otherwise conforms with the applicable ordinances of the City of Chicago and the statutes of the State of Illinois;

(d) Confiscating, damaging, injuring or destroying any or all of Plaintiff's Grade A pasteurized milk or milk products contained in single-service containers or "Pure-Pak" containers which at any time or times may be within the corporate confines of the City of Chicago, provided that the said milk and milk products otherwise conform with the applicable ordinances of the City of Chicago and the statutes of the State of Illinois.

(2) That Defendants, and each of them, be and they are hereby ordered and directed to rescind the action taken on August 30, 1940, in connection with the purported revoca-

tion of certain licenses heretofore issued to Plaintiff, and restore or re-issue to Plaintiff said permits, being milk plant permit No. 37 for its milk plant at Chemung, Illinois milk distributor permit No. 37 for premises located at 2511 West Lake Street, Melrose Park, Illinois, permits for five vehicles, Nos. 27 to 31, both inclusive, and to restore or re-issue to Plaintiff permit No. 8605 for a food purveyors and milk and milk products store located at 3819 Southport Avenue, Chicago, Illinois, provided, however, that said plant, premises, vehicles and store conform with the applicable ordinances of the City of Chicago, and provided further that the milk and milk products sought to be dealt with therein and therefrom may be sold and distributed in paper bottles or single-service containers known as "Pure-Pak" containers if the said milk and milk products otherwise conform with the applicable ordinances of the City of Chicago.

(3) That a writ of mandamus issue herein directing and compelling Defendants, and each of them, to issue or to re-issue and restore to Plaintiff a milk plant permit for its milk plant at Chemung, Illinois, a milk distributor's permit for premises located at 2511 West Lake Street, Melrose Park, Illinois, permits for five vehicles and a food distributor's permit for a store located at 3819 Southport Avenue, Chicago, Illinois, provided, however, that said plant, premises, vehicles and store conform with the applicable ordinances of the City of Chicago, and provided further that the milk and milk products sought to be dealt with therein and therefrom may be sold and distributed in paper bottles or single-service containers known as "Pure-Pak" containers if the said milk and milk products otherwise conform with the applicable ordinances of the City of Chicago.

(4) The provisions of this order shall be effective until the further order of this Court and pending the final disposition of the case of *Fieldcrest Dairies, Inc.*, Plaintiff v. *City of Chicago, et al.*, Defendants, No. 316 in the District Court of the United States for the Northern District of Illinois, Eastern Division, now pending on appeal as case No. 7502 in the Circuit Court of Appeals of the United States in and for the Seventh Circuit.

(5) For good cause shown, and the Court being of the opinion that the injunction herein ought to be granted without bond, it is further Ordered, Adjudged and Decreed that Plaintiff be not required to file any bond herein and that the filing of such bond be and the same is hereby excused.

ENTER:

(Signed) PHILIP J. FINNEGAN,  
Judge.

Dated December 3, 1940.

Approved as to form:

BARNET HODES, Corporation Counsel,  
FRED V. MAGUIRE and ALEXANDER J. RESA,  
*Assistant Corporation Counsel,*  
*Attorneys for Defendants,*

By (Signed) FRED V. MAGUIRE,  
*Assistant Corporation Counsel.*

By (Signed) J. HERZL SEGAL,  
*Assistant Corporation Counsel.*

No further proceedings have been had in the above case in the Circuit Court of Cook County, Illinois, and the time for an appeal from the order just set forth has expired.

#### D. JOINT CONCLUSIONS OF COUNSEL WITH RESPECT TO STATE COURT PROCEEDINGS.

Counsel for petitioners and for respondent in the Supreme Court of the United States agree:

1. That the state court proceedings have not decided any question of law or fact relevant to a decision by the Supreme Court of the United States of the pending cause entitled, *City of Chicago, et al., v. Fieldcrest Dairies, Inc.*, October Term, 1941, No. 706;
2. That the plaintiff, Dean Milk Company, whose wholly-owned subsidiary is Fieldcrest Dairies, Inc., and the defendants, City of Chicago, *et al.*, (petitioners in the Supreme Court of the United States) each and all requested the Circuit Court of Cook County, Illinois, to stay the proceedings in said court pending the final disposition of the case of *Fieldcrest Dairies, Inc., v. City of Chicago, et al.*, then pending in the District Court of the United States for the Northern District of Illinois, being

the case now pending on grant of certiorari by the Supreme Court of the United States.

Respectfully submitted,

CITY OF CHICAGO, a Municipal Corporation,

BOARD OF HEALTH OF THE CITY OF CHICAGO,

DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,

*Petitioners,*

By BARNET HODES,

Corporation Counsel of the City of Chicago,  
511 City Hall, Chicago, Illinois,

*Attorney for Petitioners.*

JAMES A. VELDE,

Assistant Corporation Counsel.

WALTER V. SCHAEFER,

*Of Counsel.*

FIELDCREST DAIRIES, INC.,

*Respondent,*

By FRED A. GARIEPY,

1 North LaSalle Street,  
Chicago, Illinois,

OWEN RALL,

135 South LaSalle Street,  
Chicago, Illinois,

JOHN SPALDING,

1 North LaSalle Street,  
Chicago, Illinois.

*Attorneys for Respondent.*